

No. 12261

United States  
Court of Appeals  
For the Ninth Circuit.

COMPANIA ENGRAW COMMERCIAL E. INDUSTRIAL  
S. A., a Corporation,

Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION,

Appellee,

and

SCHENLEY DISTILLERS CORPORATION,

Appellant,

vs.

COMPANIA ENGRAW COMMERCIAL E. INDUSTRIAL  
S. A., a Corporation,

Appellee.

Transcript of Record  
In Two Volumes

Volume I

Pages 1 to 522

Appeals from the United States District Court for the  
Southern District of California,  
Central Division.

FILED  
OCT 25 1949



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles 14, Calif.

For Appellee and Cross-Appellant:

BRONSON, BRONSON & McKINNON,

1500 Mills Tower,

San Francisco, Calif. [1\*]

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\* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the District Court of the United States  
for the Southern District of California,  
Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E INDUSTRIAL S. A., a corporation,  
Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a  
corporation,  
Defendant.

### COMPLAINT—BREACH OF CONTRACT

Plaintiff complains of defendant in the above entitled action and for cause of action alleges as follows, to wit:

#### I.

That jurisdiction is founded upon diversity of citizenship; that plaintiff Compania Engraw Comercial E. Industrial S. A. is a citizen of the Republic of Argentina; that defendant, Schenley Distillers Corporation, is a corporation organized and existing under and by virtue of the laws of the State of Delaware.

#### II.

That the plaintiff, Compania Engraw Comercial E. Industrial S. A., is now and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of

the Republic of Argentina and having its principal place of business in the City of Buenos Aires, Republic of Argentina. [2]

### III.

That said defendant, on or about the 28th day of May, 1945, filed in the office of the Secretary of State of the State of California a copy of its articles of incorporation, duly certified by the Secretary of State of the State of Delaware, together with a statement showing (1) the location and address of its principal office; (2) the location and address of its principal office within the State of California; (3) the name and address of a person within the State of California upon whom process directed to defendant may be served, to wit: John P. Daly, c/o C. T. Corporation System, Mills Building, San Francisco; and (4) its irrevocable consent to service upon said John P. Daly of process issuing from all courts sitting in said State of California, both State and Federal.

### IV.

That the contract hereinafter alleged was and is in writing and subscribed by said defendant; that said contract was made and entered into within the County of Los Angeles, State of California, and within the Southern District of California, Central Division thereof; that said defendant has now and at all times herein mentioned has had an office and principal place of business within said County of Los Angeles.

## V.

That on or about the 23rd day of May, 1946, a contract in writing was made and entered into by the plaintiff, on the one part, and defendant on the other part, under and by the terms whereof plaintiff agreed to sell and deliver to defendant, and defendant agreed to purchase and receive from the plaintiff, f.o.b. steamship at Buenos Aires, Republic of Argentina, 1135 tons of glucose, made from crystal clear corn syrup and testing between 43° and 45° Baume, at 1.35 Argentine pesos per kilo, packed in wooden cooperage containing approximately 660 pounds each, and delivered to McCormick Steamship Company at Buenos Aires for carriage to San Francisco or Los Angeles, California, under shipping schedule as follows:

50 tons in June, 60 tons in July, 200 tons in August, 150 tons in September, 275 tons in October, 200 tons in November, 200 tons in [3] December; all in the year 1946;

and further agreed to make payments for the total purchase price of said glucose on or before the 30th day of October, 1946, at the rate of 335.82 Argentine pesos to 100 American dollars, and thereby defendant agreed to pay to said plaintiffs the sum of Five Hundred Thirty-two Thousand, Four Hundred Forty and 83/100 (\$532,440.83) Dollars; that a true and correct copy of said contract is hereto attached, marked "Exhibit A," and hereby specifically referred to as if herein set forth at length.



## VI.

That plaintiff purchased in the Buenos Aires, Argentina, market said 1135 tons of glucose made from crystal clear corn syrup and testing between 43° and 45° Baume, at a price of 1.20 Argentine pesos per kilo for steamship deliveries as specified in said contract, more particularly alleged in paragraph V hereof, to wit: a total purchase price of Four Hundred Eighty-one Thousand, Nine Hundred Thirteen and 91/100 (\$481,913.91) Dollars; that said purchase contracts were for delivery F.A.S. Buenos Aires, Argentina; that the customary and fair cost of loading on board ship said glucose under said f.o.b. contract with said defendant is and would be the sum of 50 centavos per kilo; that is, a total cost of stevedoring for said 1135 tons of glucose changed from F.A.S. to f.o.b. delivery in the sum of Fifteen Thousand, Eight Hundred Forty-one and 22/100 (\$15,841.22) Dollars; that the net profit accruing and to accrue to plaintiff is and would be the sum of Thirty-four Thousand, Six Hundred Eighty-five and 72/100 (\$34,685.72) Dollars.

## VII.

That on or about the 7th day of June, 1946, defendant repudiated said contract and notified said plaintiffs by telegram to proceed no further therewith.

## VIII.

That plaintiff has suffered damage at the hands of said defendant by reason of defendant's repudia-

tion of said contract in the sum of Thirty-four Thousand, Six Hundred Eighty-five and 72/100 (\$34,685.72) Dollars as the net profit under said contract. [4]

### IX.

That in addition to the loss of profits as hereinbefore alleged said plaintiff has suffered and will suffer estimated loss, directly and naturally resulting in the ordinary course of events from the repudiation of said contract by defendants, in the sum of Fifty Thousand (\$50,000.00) Dollars; that plaintiff is unable at the time of the filing of this action to particularize said further damage by reason of the fact that there is not, and has not been since said 7th day of June, 1946, a free and available market for said glucose; that plaintiff will, when the amount of said damage is ascertained, pray leave to insert herein by proper amendment hereto the exact amount of said estimated damage.

### X.

That plaintiff has duly performed all of the conditions of said contract to be performed upon its part.

And for a Further and Second Cause of Action Against Said Defendant, plaintiff alleges:

### I.

Plaintiff realleges each and every allegation contained in paragraphs I, II, III and IV of the first cause of action hereof, and by reference makes

them a part hereof as though set forth at length herein.

II.

That between the 20th day of May, 1946, and the 8th day of June, 1946, defendant became indebted to plaintiff in the sum of Eighty-four Thousand, Six Hundred Eighty-five and 72/100 (\$84,685.72) Dollars; that although demand has been made therefor, said defendant has failed, neglected and refused to pay said sum or any part thereof, and that the whole thereof is now due, owing and unpaid.

Wherefore, plaintiff demands judgment against said defendant for the sum of \$84,685.72, and for interest thereon from the date of filing of this complaint to date of judgment at the legal rate, and for plaintiff's costs herein incurred.

STANTON & STANTON,  
By /s/ LOUIS B. STANTON,  
Attorneys for Plaintiffs. [5]

## EXHIBIT "A"

Schenley Distillers Corporation  
850-900 Battery Street  
San Francisco 11, California  
Telephone YUkon 0440

May 23, 1946

Harold A. Whipple Co.  
316 Commercial Street  
Los Angeles 12, California

Attention: Mr. H. A. Whipple

Gentlemen:

This will confirm our telephone conversation and your letter of May 21st.

We hereby acknowledge the offer of Cia. Engraw Comercial & Industrial S. A., of 600 tons of glucose made from pure corn syrup, crystal clear, and testing between 43 and 45 Baume, at a price of 1.375 pesos per kilogram. The price listed is f.o.b. steamer, Buenos Aires, packaged in wood cooperage containing approximately 660 pounds each. Shipment is to be made via McCormick Steamship Co. to San Francisco or Los Angeles.

A purchase order will be sent to Cia. Engraw Comercial & Industrial S. A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos. Expiration date will be October 30, 1946, or as confirmed. Shipment of this material is to be at a rate of 150 tons a month.

All correspondence will be handled via air mail instead of regular mail, in order to speed this matter.

Very truly yours,

SCHENLEY DISTILLERS  
CORPORATION,

/s/ J. B. DONNELLY.

JBD:LP

P. S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial S. A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; Sept.—150; October—275; November—200; December—200. The conditions of acceptance of this quantity are the same as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing.

[Endorsed: Filed Jan. 9, 1947. [6]]

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[Title of District Court and Cause.]

NOTICE OF MOTION, MOTION TO DISMISS,  
AND MOTION TO MAKE MORE DEFINITE AND CERTAIN. [7]

To the Plaintiff Above Named and to Messrs. Stanton & Stanton, Its Attorneys:

You and Each of You Will Please Take Notice and You Are Hereby Notified that on Monday, the 24th day of February, 1947, at the hour of

10:00 o'clock a.m. of said day or as soon thereafter as counsel may be heard, at Court Room No. 6 of the above entitled Court, located in the Federal Building in the City of Los Angeles, County of Los Angeles, State of California, Judge Ben Harrison presiding, Schenley Distillers Corporation, a Delaware corporation, by and through the undersigned, its counsel of record herein, will move said Court for an order as follows:

As to the Alleged First Cause of Action Set Forth in Plaintiff's Complaint:

1. To dismiss the alleged first cause of action because the said first cause of action fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the alleged first cause of action, or in lieu thereof for an order requiring plaintiff to aver a more definite and certain statement of the following matters appearing in paragraph V of the said first cause of action set forth in plaintiff's complaint, to-wit:

(a) To aver how or in what manner the plaintiff consented to the alleged written agreement incorporated by reference in said paragraph V and attached as an exhibit to said complaint;

(b) To aver whether the alleged offer or offers mentioned in said alleged written agreement were wholly oral or wholly written, or partly oral and partly written;



(c) To aver the terms of said alleged offer or offers [8] in haec verba, and, if said offer or offers were wholly or partly written, to furnish a copy or copies thereof;

(d) To aver specifically the items of damage claimed in paragraphs VIII and IX of said first cause of action.

As to the Alleged Second Cause of Action Set Forth in Plaintiff's Complaint:

1. To dismiss the alleged second cause of action because the said second cause of action fails to state a claim against the defendant upon which relief can be granted.

2. To dismiss the alleged second cause of action, or in lieu thereof for an order requiring plaintiff to aver a more definite and certain statement of the following matters appearing in paragraph II of the said second cause of action set forth in plaintiff's complaint, to-wit:

(a) To aver how or in what manner or for what consideration defendant incurred the alleged indebtedness to plaintiff.

Said Motion to Dismiss will be made and based upon the ground that neither the complaint nor either of the causes of action attempted to be stated therein state facts sufficient to constitute a cause of action against the defendant, or state a claim against defendant upon which relief can be granted, and said Motion to Make More Defi-

nite and Certain will be based upon the ground that the foregoing matters so sought to be restated more definitely and certainly are and each thereof is not alleged with sufficient definiteness or particularity to enable defendant to properly prepare its responsive pleading to said complaint or to prepare for the trial of the above entitled action. [9]

Said Motions will be further made and based upon all of the records, papers and files in the above entitled action including this Notice of Motion and Points and Authorities in support thereof, copies of which are herewith served upon you.

Dated: February 8, 1947.

/s/ EDGAR H. ROWE,  
BRONSON, BRONSON &  
McKINNON,  
Attorneys for Defendant. [10]

Points and Authorities in Support of the  
Foregoing Motions

Rules 7(b), 12(b) and 12(e), Rules of Civil  
Procedure for the District Courts of the  
United States.

1. The alleged first cause of action set forth in plaintiff's complaint fails to state a cause of action against defendant in that the facts alleged do not show the existence of a legally binding contract.

It is essential to the existence of a contract that the parties mutually consent to the agreement and



that such consent be communicated by each to the other. Mutual consent is communicated in the form of an offer or proposal by one party which is accepted by the other party. Unless the offer is unconditionally accepted, no contract comes into existence.

California Civil Code, Sections 1550, 1565, 1580 and 1585.

Tuso v. Green, 194 Cal. 574.

Niles v. Hancock, 140 Cal. 157.

Newspaper Readers Service, Inc., v. Canonsburg Pottery Co., 52 F. Supp. 341. 6 Cal. Jur. p. 41 and p. 61.

Willston on Contracts, Section 23.

Restatement of Contracts, Section 22.

The alleged written contract pleaded by plaintiff is merely a purported letter of acceptance and does not in itself constitute a legally binding contract. The alleged offer must be considered together with the purported letter of acceptance to determine whether a legally binding contract came into existence. That a purported letter of acceptance in itself does not constitute a legally binding agreement between the parties is evident from the following language in Tuso v. Green, 194 Cal. 574, at pages 580-581, where the Court states: [11]

“A contract between two parties is created by a proposal or offer by one of the parties and an acceptance thereof by the other. A contract of

sale may well consist of a proposal on the part of the seller embodied in a letter signed by him alone, and an acceptance thereof on the part of the buyer embodied in another letter signed by him alone. Such is the common practice in everyday affairs. When the minds of the parties meet, that is to say, when the respective writings match one another as to subject matter, terms, and conditions, a contract comes into existence between the parties, and when such terms and conditions are stated in writings which are signed by the respective parties the contract is none the less a contract in writing merely because each of the respective writings is signed by but one of the parties. Such a contract in writing fully satisfies the statute of frauds. (*Frost v. Alward*, 176 Cal. 691 (169 Pac. 379); *Merkeley v. Fisk*, 179 Cal. 748 (178 Pac. 945); 12 Cal. Jur. 904, and cases cited.) In construing such a contract the separately executed instruments are to be considered and construed together as one contract."

Where a cause of action is based upon a written contract which is pleaded in *haec verba*, then the written instrument so pleaded is controlling as to the existence and terms of the contract.

*Alphonzo E. Bell Corp. v. Bell View Oil Syndicate*, 46 Cal. App. (2d) 684, 691.

*Pimentel v. The Hall-Baker Co.*, 32 Cal. App. (2d) 697, 701.

For the foregoing reasons, a more definite statement is necessary.

Forstmann v. Wenner-Gren, 1 F. R. D. 775.

D. L. Stern Agency, Inc. v. Mutual Benefit Health and Accident Assoc., 43 F. Supp. 167.

5 Cyclopedia of Federal Procedure, Section 1745.

Furthermore, in an action for breach of contract, the items of damage claimed must be set forth specifically.

Rules 9(f) and (g), 12(e) of Rules of [12] Civil Procedure for the District Courts of the United States.

Miller Co. v. Hyman, 28 F. Supp. 312.

4 Cyclopedia of Federal Procedure, Section 1185.

2. The alleged second cause of action set forth in plaintiff's complaint fails to state a cause of action against defendant in that:

(a) No ultimate facts are stated in plaintiff's complaint from which the legal conclusion of indebtedness may be derived.

Rule 8(a) (2), Rules of Civil Procedure for the District Courts of the United States.

Washburn v. Moorman (S. D., Cal., 1938), 25 F. Supp. 546.

Tate v. Shoher, 1 F.R.D. 632.

(b) A common count will not lie where the contract is executory on both sides.

Willett & Burr v. Alpert, 181 Cal. 652, 659.

King v. San Jose Pacific Building & Loan Assoc., 41 Cal. App. (2d) 705.

For the foregoing reasons, a more definite statement is necessary.

Rules 9(f) and (g) and 12(e), Rules of Civil Procedure for the District Courts of the United States.

Respectfully submitted,

/s/ EDGAR H. ROWE,

BRONSON, BRONSON &

McKINNON,

Attorneys for Defendant. [13]

State of California,

County of Los Angeles—ss.

Lucille W. Ralls being sworn says that affiant is a citizen of the United States, over the age of 18 years, not a party to the within action and is a resident of Los Angeles County; affiant's business address is Room 1135 Fidelity Building, 548 South Spring, Los Angeles 13, California. That affiant served the within Notice of Motion and Motion to Dismiss and Motion to Make More Definite and Certain by placing a true copy thereof in an envelope addressed to Stanton & Stanton, 740 South Broadway, Los Angeles 14, California and thereafter sealing said envelope and depositing same, with postage fully prepaid, in the United States Mail at Los Angeles, California. That there is

delivery service by United States mail at the place of addressee or there is regular communication by mail between the place of mailing and the place so addressed.

/s/ LUCILLE W. RALLS.

Subscribed and sworn to before me February 10, 1947.

[Seal] /s/ BETTY WALLACE,  
Notary Public within and for said County and State.

My commission expires Feb. 6, 1949.

[Endorsed]: Filed Feb. 10, 1947. [14]

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At a stated term, to wit: The February Term A.D. 1947, of the District Court, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 24th day of February in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Ben Harrison, District Judge.

[Title of Cause.]

## ORDER DENYING MOTION TO DISMISS

This cause coming on for hearing motion of defendant to dismiss and motion to make more definite and certain, filed February 10, 1947; Messrs.

Stanton and Stanton by Attorney Stanton appearing as counsel for the plaintiff; E. H. Rowe, Esq., appearing as counsel for the defendant:

Attorney Rowe presents the said motions and the Court and counsel discuss the same. It is ordered that the said motions are denied and the defendant is allowed twenty (20) days to answer.

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[Title of District Court and Cause.]

### AMENDED COMPLAINT—BREACH OF CONTRACT

By leave of court first had and obtained, plaintiff files its amended complaint in the above entitled action and for cause of action alleges as follows, to wit:

#### I.

That jurisdiction is founded upon diversity of citizenship; that plaintiff *Compania Engraw Commercial E Industrial S. A.* is a citizen of the Republic of Argentina and defendant *Schenley Distillers Corporation* is a corporation organized and existing under and by virtue of the laws of the State of Delaware; that the amount in controversy exceeds the sum of \$3,000.00.

#### II.

That plaintiff *Compania Engraw Comercial E Industrial S. A.* is now and at all times herein mentioned has been a corporation duly organized



and existing under and by virtue of the laws of the Republic of Argentina and having its principal place of business in the City of Buenos Aires, Republic of Argentina. [16]

### III.

That defendant Schenley Distillers Corporation is now and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of Delaware; that on or about the 28th day of May, 1945, said defendant filed, in the office of the Secretary of State of the State of California, a copy of its articles of incorporation, duly certified by the Secretary of State of the State of Delaware, together with a statement showing the location and address of its principal office, the location and office of its principal office within the State of California, the name and address of a person within the State of California upon whom process directed to defendant may be served, to wit, John P. Daly, c/o C. T. Corporation System, Mills Building, San Francisco, and its irrevocable consent to service upon said John P. Daly of process issuing from all courts sitting in said State of California, both State and Federal.

### IV.

That the contract hereinafter alleged was and is in writing and subscribed by said defendant; that said contract was made and entered into within the County of Los Angeles, State of California, and within the Southern District of California, Cen-

tral Division thereof; that said defendant has now and at all times herein mentioned has had an office and principal place of business within said County of Los Angeles, State of California.

## V.

That on or about the 23rd day of May, 1946, consequent upon oral and written offers a contract in writing was made and entered into by plaintiff on the one part and defendant on the other part, under and by the terms whereof plaintiff agreed to sell and deliver to defendant, and defendant agreed to purchase and receive from the plaintiff, f.o.b. steamship at Buenos Aires, Republic of Argentina, 1135 tons of glucose, made from pure, crystal clear, corn syrup and testing between 43° and 45° Baume, at 1.375 Argentine pesos per kilo, packed in wooden cooperage containing approximately 660 pounds each, and delivered to McCormick Steamship Company at Buenos Aires for carriage to San Francisco or Los Angeles, California, under shipping schedule as follows: [17]

50 tons in June, 60 tons in July, 200 tons in August, 150 tons in September, 275 tons in October, 200 tons in November, 200 tons in December; all in the year 1946;

and further agreed to make payments for the total purchase price of said glucose on or before the 30th day of October, 1946, at the rate of 335.82 Argentine pesos to 100 American dollars, and thereby defendant agreed to pay to plaintiff the



sum of \$464,720.68; that a true and correct copy of said contract is hereto attached, marked "Exhibit A" and hereby specifically referred to as if herein set forth at length.

#### VI.

That plaintiff purchased on the Buenos Aires, Argentina, market said 1135 tons of glucose made from pure, crystal clear, corn syrup and testing between 43° and 45° Baume, packaged in wooden cooperage containing approximately 660 pounds each, ready for delivery to McCormick Steamship Company steamers at said Buenos Aires, at the delivery dates set forth and prescribed in said shipping schedule; that said plaintiff duly performed each and all of the conditions and provisions under said contract to be performed upon its part and was ready, willing and able at the times of the various deliveries specified therein to make and deliver in true accord with said contract the glucose to be delivered thereunder.

#### VII.

That on or about the 7th day of June, 1946, said defendant informed said plaintiff at Los Angeles, California, by wire, to proceed no further with said contract or deliveries thereunder.

#### VIII.

That plaintiff immediately thereafter commenced negotiations with said defendant and said defendant actively and continuously negotiated with said plaintiff for the completion of said contract and

deliveries thereunder up to and until the 18th day of September, 1946; that on or about said 18th day of September, 1946, said defendant definitely refused to accept any deliveries under or pursuant to said contract. [18]

### IX.

That on or about the 18th day of September, 1946, at the City of New York, said plaintiff made and delivered to said defendant a notice in writing of its intention to resell said 1135 tons of glucose; that a true and correct copy of said notice is hereto attached, marked "Exhibit B" and hereby specifically referred to as if herein set forth at length; that at said time said defendant had a principal office in said City of New York, State of New York.

### X.

That there was an actual market in the City of Buenos Aires, Argentina, for the purchase and sale of glucose made from pure, crystal clear, corn syrup and testing between 43° and 45° Baume, both for internal consumption and for exportation, during the period from May 23, 1946, to May 7, 1947; that the market price for said glucose at and in the Buenos Aires market for the months, commencing with June, to and including the month of November, 1946, was the sum of 60c per kilogram; that the market price for said glucose in said Buenos Aires market for deliveries during the month of December, 1946, was the sum of 57c per kilogram; that said market prices were for bulk

glucose; that the cost of cooperage to place said glucose in kegs containing 660 pounds each and to deliver said glucose so packed free on board of the vessel in Buenos Aires during all of said period was the sum of 15 centavos per kilogram; that the total cost of said cooperage and delivery costs and charges for said 1135 tons of glucose during said period was the sum of \$50,696.79; that the total market price in said Buenos Aires market for said 1135 tons of glucose during said period, calculated at said respective market prices and reduced to American dollars at the contract exchange rate aforesaid of 3.3582 pesos to the dollar, was and is the sum of \$201,595.90; that the total cost of said glucose, cooperage and expense of placing said glucose on board ship in Buenos Aires was and is the sum of \$252,292.69.

### XI.

That by reason of said refusal on the part of said defendant to accept and pay for said 1135 tons of glucose, said plaintiff has suffered damage at the hands of said defendant in the sum of \$212,427.99; that said sum is equal to the difference between said contract price of \$464,720.68 and said cost of [19] placing said glucose on board of vessel in Buenos Aires in accordance with said shipping schedule in the sum of \$252,292.69.

And for a Second and Further Cause of Action Against Said Defendant, plaintiff alleges as follows, to wit:

### I.

Re-alleges each and all of the allegations con-

tained in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the first count of this complaint.

## II.

That between said 18th of September, 1946, and the 9th day of April, 1947, plaintiff assiduously endeavored to resell said 1135 tons of glucose and to resell various portions thereof in the market of Buenos Aires and in the various markets of the world at large; that on or about the 9th day of April, 1947, said plaintiff sold and disposed of the whole of said 1135 tons of glucose.

## III.

That there was an actual market in the City of Buenos Aires, Argentina, for the purchase and sale of glucose made from pure, crystal clear, corn syrup, and testing between 43° and 45° Baume, on or about the said 9th day of April, 1947; that said market price for said glucose prevailing during said month of April, 1947, was the sum of 50 centavos per kilogram; that said market price was for bulk glucose; that the cost of cooperage to place said glucose in kegs containing 660 pounds each and to deliver said glucose so packed f.o.b. of a vessel in Buenos Aires during said month of April was the sum of 15 centavos per kilogram; that the total cost of said cooperage and delivery costs and charges for said 1135 tons of glucose on said 9th day of April, 1947, was the sum of \$50,-696.79; that the total market price in said Buenos Aires market for said 1135 tons of glucose on or

about said 9th day of April, 1947, calculated at said market price and reduced to American dollars at the contract exchange rate aforesaid of 3.3582 pesos to the dollar, was and is the sum of \$168,-989.34; that the total cost of said glucose cooperage and expenses of placing said glucose on board ship in Buenos Aires on said 9th day of April, 1947, was and is the sum of \$219,686.13. [20]

#### IV.

That by reason of said refusal on the part of said defendant to accept and pay for said 1135 tons of glucose, said plaintiff has suffered damage at the hands of said defendant in the sum of \$245,034.55; that said sum is equal to the difference between said contract price of \$464,720.68 and said cost of placing said glucose on board vessel in Buenos Aires on said 9th day of April, 1947, in said total sum of \$219,686.13.

And for a further and third cause of action against said defendant, plaintiff alleges as follows, to wit:

#### I.

Plaintiff re-alleges each and every allegation contained in paragraphs I to IX, inclusive, of the first count of this complaint, and by reference makes them a part hereof as if set forth at length herein.

#### II.

That between the 20th day of May, 1946, and the 10th day of May, 1947, defendant became indebted

to plaintiff in the sum of \$245,034.55; that although demand has been made therefor, said defendant has failed, neglected and refused to pay said sum or any part thereof and that the whole thereof is wholly due, owing and unpaid.

Wherefore, plaintiff prays judgment against said defendant for the sum of \$245,034.55, together with interest thereon at the legal rate of 7% per annum, from the 26th day of October, 1946, to date of judgment, and for plaintiff's costs herein incurred.

STANTON & STANTON,  
By /s/ LOUIS B. STANTON,  
Attorneys for Plaintiff. [21]

EXHIBIT "A"

Schenley Distillers Corporation  
850-900 Battery Street  
San Francisco 11, California  
Telephone YUkon 0440

May 23, 1946

Harold A. Whipple Co.  
316 Commercial Street  
Los Angeles 12, California

Attention: Mr. H. A. Whipple

Gentlemen:

This will confirm our telephone conversation and your letter of May 21st.

We hereby acknowledge the offer of Cia. Engraw Comercial & Industrial S. A., of 600 tons of glu-



cose made from pure corn syrup, crystal clear, and testing between 43 and 45 Baume, at a price of 1.375 pesos per kilogram. The price listed is f.o.b. steamer, Buenos Aires, packaged in wood cooperage containing approximately 660 pounds each. Shipment is to be made via McCormick Steamship Co. to San Francisco or Los Angeles.

A purchase order will be sent to Cia. Engraw Comercial & Industrial S. A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos. Expiration date will be October 30, 1946, or as confirmed. Shipment of this material is to be at a rate of 150 tons a month.

All correspondence will be handled via air mail instead of regular mail, in order to speed this matter.

Very truly yours

SCHENLEY DISTILLERS  
CORPORATION

/s/ J. B. DONNELLY

JBD:LP

P. S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial S. A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; Sept.—150; October—275; November—200; December—200. The conditions of acceptance of this quantity are the same as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing. [22]

EXHIBIT "B"  
Hotel New Yorker  
New York, N. Y.

September 18, 1946

Mr. Ralph Heymsfeld,  
Schenley Distillers Corp.,  
350 Fifth Avenue,  
New York, N. Y.

Dear Sir:

This is to notify you that the suppliers with whom we contracted for the 1135 tons of glucose which we sold to your Company have finally refused to accept cancellation of the contracts. We are, therefore, proceeding to sell the glucose at best prices obtainable and will, of course, look to you for payment to us of the difference between the prices thus obtained and the price at which you contracted to purchase the same.

Yours truly,

COMPANIA ENGRAW  
COMERCIAL E  
INDUSTRIAL S. A.

By G. FRED BERGER

Receipt of copy acknowledged.

[Lodged]: July 24, 1947.

[Endorsed]: Filed Aug. 4, 1947. [23]



NOTICE OF MOTION, AND MOTION TO DISMISS, AND MOTION TO MAKE MORE DEFINITE AND CERTAIN AND POINTS AND AUTHORITIES IN SUPPORT THEREOF [25]

To Plaintiff Above Named and to Messrs. Stanton & Stanton, Its Attorneys:

You And Each of You Will Please Take Notice that on Monday, the 25th day of August, 1947, at the hour of 10:00 o'clock A.M. of said day or as soon thereafter as counsel may be heard at court room No. 6 of the above entitled court located in the Federal Building, City of Los Angeles, County of Los Angeles, State of California, defendant Schenley Distillers Corporation, a Delaware corporation, by and through the undersigned, its counsel of record herein, will move said court for orders as follows; with respect to plaintiff's amended complaint.

I.

Motion to Dismiss

1. To dismiss the first cause of action in said complaint because said first cause of action fails to state a claim upon which relief can be granted in that:

(a) There are no allegations contained in said cause of action showing or alleging the existence of any contract upon which a cause of action could be based;

(b) There are no facts alleged in said cause of action which support any claim for damages or which show that plaintiff was damaged by any act or omission of defendant.

2. To dismiss the second cause of action in said complaint because said second cause of action fails to state a claim upon which relief can be granted in that:

(a) There are no allegations contained in said cause of action showing or alleging the existence of any contract upon which a cause of action could be based;

(b) There are no facts alleged in said cause of action which support any claim for damages or which show that plaintiff was damaged by any act or omission of defendant.

3. To dismiss the third cause of action in said complaint [26] because said third cause of action fails to state a claim upon which relief can be granted in that:

(a) There are no allegations contained in said cause of action showing or alleging the existence of any contract upon which a cause of action could be based;

(b) There are no facts alleged in said cause of action which support any claim for damages or which show that plaintiff was damaged by any act or omission of defendant;

(c) A common count will not lie to recover for the breach of an express executory contract.

## II.

### Motion for a More Definite Statement of Complaint

#### 1. As To The First Cause Of Action:

(a) How or in what manner the allegations of paragraph V constitute any part of the alleged contract in writing attached to plaintiff's complaint and marked "Exhibit A" and particularly the alleged promise and agreement to pay plaintiff the sum of \$464,720.68;

(b) How or in what manner plaintiff assented to or became bound by the alleged written agreement incorporated by reference in said paragraph V and attached as "Exhibit A" to said complaint.

(c) How or in what manner the alleged written agreement incorporated by reference in said paragraph V and attached as "Exhibit A" to said complaint constitutes a complete or any agreement between the parties.

(d) On what dates plaintiff purchased 1135 tons of glucose as alleged in Paragraph VI of said complaint and more particularly whether such purchase was made before or after June 7, 1946, or partly before and partly after June 7, 1946. [27]

(e) What price plaintiff paid for 1135 tons of glucose purchased as alleged in paragraph VII of said complaint.

(f) In what connection and for what purpose plaintiff negotiated with defendant as alleged in paragraph VIII of said complaint and to what end said negotiations were carried on as alleged.

(g) How or in what manner the allegations contained in paragraph X of said complaint are related to or have any bearing upon the cause of action sought to be stated by plaintiff, or relate to or have any bearing upon any damage suffered by plaintiff as a result of any alleged breach of said alleged contract.

(h) Whether plaintiff paid and expended the sum of \$201,595.90 in the purchase of said 1135 tons of glucose or more or less than that amount.

2. As to the Second Cause of Action:

(a) To make more definite and certain statements in connection with the second cause of action in the same particulars as set forth hereinabove in subdivisions (a) to (f) inclusive with regard to the first cause of action;

(b) Whether plaintiff was unable to sell said 1135 tons of glucose prior to April 9, 1947;

(c) Whether plaintiff actually sold said 1135 tons of glucose on the 9th day of April, 1947;

(d) At what price plaintiff sold said 1135 tons of glucose, if he did sell the same;

(e) Whether plaintiff sold said 1135 tons of glucose for his own account, or for or on behalf of defendant;

(f) Whether said 1135 tons of glucose had any market value on September 18, 1946; or on June 7, 1947.

(g) What relation or bearing the allegations of paragraphs III and IV have to or upon any damage sustained by plaintiff as a result of any alleged breach of any alleged contract. [28]

(h) Whether plaintiff suffered any damage, or lost any money, or lost any profit as a result of any alleged breach of any alleged contract.

3. As to the Third Cause of Action:

(a) To make more definite and certain statements in connection with the third cause of action in the same particulars as hereinabove set forth in subdivisions (a) to (f) inclusive with regard to the first cause of action;

(b) How or in what manner and in what particulars defendant became indebted to plaintiff in the sum as alleged in paragraph II of the third cause of action of said complaint.

### III.

#### Motion to Strike

(a) To strike from the records the whole of plaintiff's complaint on the ground that it and every allegation therein contained is irrelevant in that no cause of action or basis for relief is pleaded; or

(b) To strike from said complaint the whole of the second cause of action because it is identical to

the first cause of action, and is, therefore, surplusage, redundant, and irrelevant; and/or

(c) To strike from the first cause of action the whole of paragraph X because it is completely irrelevant to the cause of action sought to be stated and any relief obtainable or sought to be obtained; and/or

(d) To strike from the complaint the whole of the third cause of action because a common count does not lie to recover on an express executory contract.

Said motion to dismiss will be made and based upon the ground that neither the complaint nor the causes of action attempted to be stated therein states facts sufficient to [29] constitute a cause of action against the defendant or states a claim against defendant upon which relief can be granted. Said motion to make more definite and certain will be based upon the ground that the foregoing matters so sought to be restated more definitely and certainly and each thereof is not alleged with sufficient definiteness or particularity to enable defendant to properly prepare its responsive pleading to said complaint or to prepare for the trial of the above entitled action.

Said motions will be made and based upon all of the records, papers and files in the above entitled action, upon this notice of motion and the motions herein contained and the points and authorities in



support thereof, copies of which are hereto served upon you.

Dated: August 18, 1947.

/s/ EDGAR H. ROWE,  
BRONSON, BRONSON &  
McKINNON,  
Attorneys for Defendant. [30]

Memorandum of Points and Authorities in Support  
of the Foregoing Motions

I.

Motion to Dismiss

Plaintiff has failed to show or plead the existence of a contract between itself and defendant. They cannot properly, therefore, state a cause of action for damages.

The letter pleaded in haec verba, and attached as "Exhibit A" to the complaint cannot constitute a written contract for the following reasons:

1. It is signed by only one party.
2. It is expressly not a written contract, but a communication to plaintiff which is in response to a proposal submitted to defendant by plaintiff. It is, therefore, either an acceptance or a counter-offer to which plaintiff must plead an acceptance by itself. If it is an acceptance of an offer, the complaint, if it is adequately to plead a contract, must show that this letter created a contract by pleading an offer which the letter accepts unconditionally. If, on the



other hand, the letter varies or adds any terms or qualifications to the offer, the letter is not an acceptance but a counter-offer, which plaintiff must plead that it accepted. (The letter itself indicates clearly that this latter situation is the fact.) As the complaint stands, there is alleged merely a letter from defendant to plaintiff which cannot have created, in itself, a contract. There must be alleged in addition either facts leading up to the letter (i. e., an offer), or occurring after its receipt (an acceptance by plaintiff), one of which is essential to the showing of any contract based upon the pleaded letter. Two parties are essential to the creation of a contract, and a meeting of the minds must occur between them. Plaintiff's pleading seems to be based upon the fact that a contract can be [31] created by one party, without any meeting of the minds, or any communication of assent.

The following authorities support the foregoing statements:

California Civil Code, Sections 1550, 1565,  
1580, and 1585

Tuso v. Green, 194 Cal. 574

Niles v. Hancock, 140 Cal. 157

Newspaper Readers' Service, Inc. v. Canons-  
burg Pottery Co., 52 F. Supp. 341

6 Cal. Jur. 41, 61

Williston on Contracts, Sec. 23

Restatement of Contracts, Sec. 22

The complaint purports to plead a contract in haec verba. The written instrument, therefore, is controlling as to the existence and terms of the contract.

Alphonzo E. Bell Corp. v. Bell View Oil Syndicate, 46 Cal. App. (2d) 684, 691

Pimentel v. Hall-Baker Co., 32 Cal. App. (2d) 697, 701.

Since the letter is relied upon in all three causes of action, the foregoing argument reaches every cause of action sought to be stated.

The third cause of action is vulnerable on two additional grounds.

1. It purports to be a common count in assumpsit, and it is settled that a common count does not lie to recover for the breach of an express executory contract.

3 Cal. Jur. 382, 383

Willett & Burr v. Alpert, 181 Cal. 652, 659

King v. San Jose Pac. Bldg. & Loan Ass'n.,  
41 Cal. App. (2d) 705

2. Ultimate facts must be pleaded from which any [32] conclusion of indebtedness may be deduced.

Rule 8(a)(2), Rules of Civil Procedure

Washburn v. Moorman, (S.O., Cal., 1938) 25  
F. Supp. 546

Tate v. Shober, 1 F.R.D. 632

## II.

## Motion for More Definite Statement

In our motion for a more definite statement, requests (a) to (c), inclusive, parallel our argument that the letter pleaded in *haec verba* does not of itself constitute a contract. We ask that the additional allegations necessary to plead a contract be set forth. We point out further in request (a) that there is no basis in the pleaded letter for the conclusions of the pleader that defendant promised to pay \$464,720.68 on an exchange rate of 335.82 Argentine pesos to 100 American dollars.

The remaining requests relate generally to damages, and the theories upon which plaintiff seeks to recover them.

Section 3358 of the California Civil Code, provides:

“Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in the cases specified in the articles on exemplary damages and penal damages . . .”

The measure of damages in an action by a seller for breach of contract is statutory.

Where the seller has performed and the buyer refuses to accept delivery and the seller retains the goods, the measure of damages is the difference

between the contract price and the market value of the goods at the date of the breach.

California Civil Code, Section 1784 [33]

Rice v. Schmid, 18 Cal. (2d) 259

Rice v. Schmid (a subsequent appeal) 25 Cal. (2d) 259

Applying these principles to the complaint in this action, it is clear that plaintiff's measure of damage is the difference between the market price at the time of the breach, that is, on June 7, 1947, and the contract price.

Because of these rules, and the facts alleged, we seek to have the following additional information pleaded, in order to ascertain what relevance, if any, certain of the pleaded facts have to plaintiff's cause of action or damages:

1. What did plaintiff pay for the goods it allegedly purchased?
2. When did it purchase those goods—before or after June 7, 1946, on which date defendant allegedly notified plaintiff to proceed no further?
3. Did plaintiff actually resell the goods? The second cause of action merely indicates that plaintiff could have sold them on April 9, 1947.
4. If it did re-sell the goods, what price did it receive for them?
5. If plaintiff did not sell the goods, and it still

has them, what did it pay for them? The first cause of action alleges prices at which the goods could have been purchased by it, but not whether it actually paid those prices.

Plaintiff's complaint is also inconsistent in that it pleads in the first cause of action that there was a market for glucose on and after June 7, 1946 but in the second cause of action it pleads, in effect, that there was no market from September 18, 1946 to April 9, 1947.

In its first cause of action, plaintiff apparently seeks to recover on the basis of loss of profits. That is not the [34] measure of plaintiff's damage. (Even if it were, however, we have shown above that plaintiff didn't establish the cost of the goods to it.)

In its second cause of action, plaintiff pleads damages based upon what the goods could have been resold for on April 9, 1947. However, plaintiff doesn't plead (1) that there was no market for the goods on June 7, 1946, the date of the alleged breach, or (2) that it actually did sell the goods at all, and if so, for what price.

### III.

#### Motion to Strike

The first and second causes of action are identical in theory. One of them, therefore, is surplusage. The only difference in the two counts is the manner in which the measure of damage is pleaded. How-

ever, as to this, plaintiff can have no alternative or election. Under the facts of any given case, there can be only one measure of damage; i.e., the difference between the market value at date of breach and the contract price. The second cause of action, therefore, which attempts to fix damages on the basis of a re-sale price should be stricken.

The allegations of paragraph X of the first cause of action are irrelevant, and should be stricken. Plaintiff pleads therein prices at which glucose could have been purchased by it at various times. But it does not allege that it purchased the glucose at those prices. However, even if it did so allege, the allegations should still be stricken because they form the basis for a claim for loss of profits. Under none of the facts alleged can loss of profits be recovered in this case.

The third cause of action should be stricken because a common count does not lie for the breach of an express executory contract.

Respectfully submitted,

/s/ EDGAR H. ROWE,

BRONSON, BRONSON &

McKINNON,

Attorneys for Defendant. [35]

#### AFFIDAVIT OF SERVICE BY MAIL

State of California

City and County of San Francisco—ss.

Lucile Carlson, being duly sworn, deposes and says: That she is and at all times herein mentioned



was a citizen of the United States residing in San Francisco, where the mailing herein referred to took place; that she is over the age of 18 years, not a party to the within entitled cause nor interested in the event thereof. That at all of the times herein mentioned she was and still is a clerk and employee in the office of Bronson, Bronson & McKinnon, attorneys for Defendant Schenley Distillers Corporation in the above entitled action; that at all times herein mentioned the office of said Bronson, Bronson & McKinnon was and now is at 1500 Mills Tower, 220 Bush Street, in the City and County of San Francisco, State of California. That at all times herein mentioned the office of Stanton & Stanton, attorneys for Plaintiff, Compania Engraw Commercial E Industrial S. A. was and still is at 6926 Melrose Street, Los Angeles, California. That on the 18th day of August, 1947 affiant served the within Notice of Motion and Motion to Dismiss and Motion to Make More Definite and Certain and Points and Authorities in Support Thereof by mail, in the following manner: Affiant enclosed a true copy of said documents in an envelope addressed as follows: Stanton & Stanton, 6926 Melrose Street, Los Angeles, California, sealed said envelope and deposited it, so sealed and addressed on said 18th day of August, 1947 with the said enclosure therein and with the postage thereon fully prepaid, in the United States Post Office in the City and County of San Francisco, State of California. That there



is a regular daily communication by mail between said points of mailing.

/s/ LUCILE CARLSON.

Subscribed and sworn to before me this 18th day of August, 1947.

[Seal] /s/ ALFRED D. MARTIN,

Notary Public.

In and for the City and County of San Francisco,  
State of California. [36]

### ORDER SHORTENING TIME

Good cause appearing therefor, it is hereby ordered that the foregoing motions may be heard at the time hereinbefore noticed, provided copies of said notice of motion and motion to dismiss and motion to make more definite and certain and points and authorities in support thereof are served upon plaintiff's attorneys on or before Wednesday, August 20, 1947.

/s/ JACOB WEINBERGER,

Judge of the U. S.

District Court.

[Endorsed]: Filed Aug. 20, 1947. [37]

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At a stated term, to wit: The February Term, A. D. 1947, of the United States District Court, within and for the Central Division of the Southern District of California, held at the Court Room

thereof, in the City of Los Angeles on Monday the 25th day of August in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Ben Harrison,  
District Judge

[Title of Cause.]

### ORDER DENYING MOTION TO DISMISS

For hearing (1) motion to produce, pursuant to notice thereof filed Aug. 8, 1947; (2) motion to vacate and/or strike plaintiff's notice of intention to take depositions upon written interrogatories, pursuant to notice thereof filed Aug. 8, 1947; (3) motion to settle interrogatories, pursuant to notice thereof, filed Aug. 13, 1947; (4) motion to require answers to questions on deposition, pursuant to notice thereof filed Aug. 16, 1947; (5) motions to dismiss, to make more definite and certain, pursuant to notices thereof filed Aug. 20, 1947; (6) motion to produce, pursuant to notice thereof filed Aug. 20, 1947; and (7) motion to require answers to questions on deposition, pursuant to notice thereof filed Aug. 20, 1947; Louis B. Stanton, Esq., for plaintiff; E. H. Rowe, Esq., for defendant;

Motion to dismiss will be submitted on briefs to be filed 5 x 5; other motions continued until motion to dismiss is determined.

Court orders trial date of Sept. 23, 1947, vacated, and continues cause to 2 PM today for argument.

At 2 PM motion to dismiss is denied, 10 days allowed to answer. [38]

[Title of District Court and Cause.]

## ANSWER TO AMENDED COMPLAINT

Defendant, Schenley Distillers Corporation, a corporation, answering plaintiff's amended complaint on file herein, admits, denies and alleges:

### As to the First Cause of Action

#### I.

Plaintiff can not maintain this action because it is a foreign corporation doing business in the State of California without having complied with the provisions of Section 405 of the Civil Code of the State of California and in violation [39] of Section 408 of the Civil Code of the State of California.

#### II.

The first cause of action of plaintiff's amended complaint fails to state a claim against defendant upon which relief can be granted.

#### III.

Answering paragraph I, defendant admits that it is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and admits that the amount in controversy exceeds the sum of \$3,000.00.

Further answering said paragraph I defendant states that it has no information or belief upon the subject of the remaining allegations thereof sufficient to enable it to answer said allegations, and placing its denial upon that ground denies each and every, all and singular, said allegations.

## IV.

Answering paragraph II, defendant states that it has no information or belief on the subject of any allegations thereof sufficient to enable it to answer said allegations, and placing its denial upon that ground denies each and every, all and singular, said allegations.

## V.

Answering paragraph IV, defendant admits that it has now and at all times mentioned has had an office and place of business within the County of Los Angeles.

Further answering said paragraph IV, defendant denies generally and specifically each and every, all and singular, the remaining allegations of said paragraph.

## VI.

Answering paragraph V, defendant admits that J. B. Donnelly signed and addressed the letter to Harry A. Whipple Co. which is Exhibit "A" attached to the amended complaint and [40] which is incorporated by reference in paragraph V thereof.

Further answering paragraph V, defendant denies generally and specifically, each and every, all and singular, the remaining allegations contained in said paragraph.

## VII.

Answering paragraph VI, defendant states that it has no information or belief on the subject of any

allegations thereof sufficient to enable it to answer any of the allegations of said paragraph, and placing its denial upon that ground denies each and every, all and singular, said allegations.

### VIII.

Defendant denies each and every, all and singular, the allegations of paragraph VII and in this connection defendant alleges that on or about the 7th day of June, 1946, it advised Harold A. Whipple Co. by telegram and otherwise that it would not enter into any agreement with plaintiff for the purchase of glucose.

### IX.

Answering paragraph VIII, defendant alleges that it never accepted any deliveries of glucose from plaintiff.

Except as alleged herein and further answering paragraph VIII, defendant denies generally and specifically, each and every, all and singular, the remaining allegations contained in said paragraph.

### X.

Answering paragraph IX, defendant admits that it received from plaintiff the letter attached to plaintiff's amended complaint and marked Exhibit "B", to which letter defendant replied in writing by mail; a true and correct copy of defendant's reply is hereto attached, marked Exhibit "A" and made a part hereof by this reference the same as though specifically set out in full herein. [41]

Further answering paragraph IX, defendant denies generally and specifically, each and every, all and singular, the remaining allegations contained in said paragraph.

#### XI.

Answering paragraph X, defendant states that it has no information or belief on the subject of any allegations thereof sufficient to enable it to answer any of the allegations of said paragraph, and placing its denial upon that ground denies each and every, all and singular, said allegations.

#### XII.

Answering paragraph XI, defendant denies that plaintiff has suffered damage in the sum of \$212,-427.99, or any part thereof, or in any amount, by reason of any act or omission on the part of defendant or in any manner or at all, and in this connection defendant further alleges that it was not a party to any contract with plaintiff.

Further answering paragraph XI, defendant denies generally and specifically, each and every, all and singular, the remaining allegations contained in said paragraph.

### As to the Second Cause of Action

#### I.

Plaintiff can not maintain this action because it is a foreign corporation doing business in the State of California without having complied with the provisions of Section 405 of the Civil Code of the



State of California and in violation of Section 408 of the Civil Code of the State of California.

II.

The second cause of action of plaintiff's amended complaint fails to state a claim against defendant upon which relief can be granted. [42]

III.

Defendant re-alleges each and every denial and allegation contained in its answer to paragraphs I, II, IV, V, VI, VII, VIII, IX, X and XI of the first cause of action, and by this reference makes each of said denials and allegations a part hereof the same as though specifically set forth herein.

IV.

Answering paragraph II of this cause of action, defendant states that it has no information or belief on the subject of any allegations thereof sufficient to enable it to answer any of the allegations of said paragraph, and placing its denial upon that ground denies each and every, all and singular, said allegations.

V.

Answering paragraph III, defendant states that it has no information or belief on the subject of any allegations thereof sufficient to enable it to answer any of the allegations of said paragraph, and placing its denial upon that ground denies each and every, all and singular, said allegations.

VI.

Answering paragraph IV, defendant denies that



plaintiff has suffered damage in the sum of \$245,-034.55, or any part thereof, or in any amount which plaintiff may hereafter particularize, by reason of any act or omission on the part of defendant or at all, and in this connection defendant further alleges that it was not a party to any contract with plaintiff.

Further answering paragraph IV, defendant denies generally and specifically, each and every, all and singular, the remaining allegations contained in said paragraph.

As a Further, Separate, Affirmative Defense To The Amended Complaint and Each Cause of Action Thereof, This Answering Defendant Alleges: [43]

I.

The alleged contract set forth in each of the alleged causes of action contained in plaintiff's amended complaint is invalid and unenforceable by reason of the provisions of Section 1724 of the Civil Code of the State of California and Section 1973a of the Code of Civil Procedure of the State of California.

As a Further, Separate, Affirmative Defense to the Amended Complaint and Each Cause of Action Thereof, This Answering Defendant Alleges:

I.

The subject matter of the alleged sale agreement set forth in the plaintiff's amended complaint is

Argentine glucose; had any such agreement as alleged in said amended complaint been made and entered into between plaintiff and defendant (a fact which defendant specifically denies) it would have been impossible for plaintiff to have performed the said alleged agreement for the reason that, as defendant is informed and believes and upon such information and belief alleges, the export of glucose from the Argentine Republic to any other country was specifically prohibited by the laws of the Argentine Republic Nos. 12.591, 12.830 and Article 14 of Law No. 15.591, and regulations and orders regularly passed and made thereunder, during the period during which deliveries pursuant to the terms of said alleged contract were to be made by plaintiff at a West Coast port of the United States of America.

Wherefore defendant prays that plaintiff take nothing by its action and that defendant have judgment against plaintiff for its costs of suit herein, and for such other relief as may be meet and proper in the premises.

/s/ EDGAR H. ROWE,

BRONSON, BRONSON &

McKINNON,

Attorneys for Defendant. [44]

## EXHIBIT "A"

## SCHENLEY DISTILLERS CORPORATION

September 20, 1946

COMPANIA ENGRAW

Commercial E Industrial S. A.

San Martin 329

Buenos Aires

R. Argentina

Dear Sirs:

Your letter of September eighteenth has been received and in reply we beg to advise that the statement in your letter that you bought glucose for our Company is incorrect and that, as you have been previously and repeatedly advised, we have no obligation to you in the matter.

Yours very truly,

SCHENLEY DISTILLERS  
CORPORATION

/s/ RALPH T. HEYMSFELD.

CC: Mr. G. Fred Berger

Room 1807

Hotel New Yorker

New York, N. Y.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 4, 1947. [45]

[Title of District Court and Cause.]

NOTICE OF MOTION TO FILE  
AMENDMENT TO AMENDED COMPLAINT

To Defendant In the Above Entitled Action and  
to Messrs. Bronson, Bronson & McKinnon,  
Attorneys for Said Defendant:

You and Each Of You Will Please Take Notice that the plaintiff in the above entitled action, in the courtroom of the Honorable Leon R. Yankwich, in the Federal Building, in the City of Los Angeles, within said Southern District of California, on the 20th day of September, 1948, at 10:00 a.m. thereof, or as soon as counsel can be heard, will move the above entitled court for an order authorizing the filing of an amendment to the amended complaint of plaintiff herein, thereby amending paragraph V of the first count of said complaint and the corresponding inclusion of paragraph V of the first count of said amended complaint in paragraph I of the second cause of action therein, and will further move the court that service of said amendment made herewith be deemed and considered as service of said amendment, and that said amendment take effect as of date of the order hereon. [47]

Said motion will be made upon the ground that said amendment conforms to the proof herein.

Said motion will be made upon the amendment served and filed herewith.

Said motion will be made under the terms and

provisions of Rule 15-b of Federal Rules of Procedure.

Dated: This 10th day of September, 1948.

STANTON & STANTON,  
By /s/ LOUIS B. STANTON. [48]

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[Title of District Court and Cause.]

#### AMENDMENT TO AMENDED COMPLAINT

Now comes plaintiff, by leave of court first had and obtained, and files this, its amendment to the amended complaint, being paragraph V of the first cause of action and as realleged by paragraph I of the second cause of action.

#### V.

That between the 19th day of May, 1946, and the 25th day of May, 1946, a contract was made and entered into between plaintiff and defendant, under and by the terms whereof plaintiff agreed to sell and deliver to defendant, and defendant agreed to purchase and receive from plaintiff, 1135 tons of glucose made from pure, crystal-clear corn syrup testing between 43° and 45° Baume, with all costs and expenses paid on board steamship of the McCormick Steamship Co. in the Harbour of Buenos Aires, Argentina, for carriage to San Francisco or Los Angeles, at buyer's expense, at the price of 1.375 Argentine Pesos per kilo, packed in wooden

cooperage and containing approximately 660 pounds each, on a shipping schedule of 50 tons in June, 60 tons in July, 200 tons in August, 150 tons in September, 275 tons in [49] October, 200 tons in November and 200 tons in December, all in the year 1946; that said plaintiff undertook to furnish with each shipment a certificate of analysis, showing the glucose in each shipment to be of the prescribed specifications, and a certificate of inspection of cooperage; that thereby the total purchase price was \$464,720.68; that said defendant agreed to make payment of said total purchase price on or before the 30th day of October, 1946, by letter of credit at the exchange rate of 335.82 Argentine pesos to 100 American dollars; that said contract was evidenced by four letters in writing passing between plaintiff and defendant, respectively of dates May 20, May 21 and May 23, 1946; that memorandum in writing of said contract was signed by said defendant through and by its agent fully authorized so to do in that behalf; that a true and correct copy of said memorandum of sale is hereto attached, marked "Exhibit A" and hereby specifically referred to as if herein set forth at length.

STANTON & STANTON,

By /s/ LOUIS B. STANTON.

### AFFIDAVIT OF SERVICE BY MAIL

State of California,

County of Los Angeles—ss.

Madeline Curry being first duly sworn, says:  
That affiant is a citizen of the United States and a



resident of the county of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is 740 South Broadway, Suite 1004-09, Los Angeles 14, California; that on the 10th day of September, 1948, affiant served the within Notice of Motion to File Amendment to Amended Complaint and Amendment to Amended Complaint on the defendant in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said defendant at the office address of said attorneys, as follows: Messrs. Bronson, Bronson & McKinnon, 1500 Mills Tower, 220 Bush Street, San Francisco 4, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorneys for the person by and for whom said service was made.

That there is delivery service by the United States mail at the place so addressed or \*\* there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ MADELINE CURRY.

Subscribed and sworn to before me this 10th day of September, 1948.

[Seal] /s/ JOHN L. WELBOURN,  
Notary Public in and for the County of Los Angeles, State of California.

Copy received.

[Endorsed]: Filed Sept. 10, 1948. [51]

At a stated term, to wit: The September Term. A.D. 1948, of the United States District Court, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 20th day of September in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Leon R. Yankwich,  
District Judge.

[Title of Cause.]

ORDER PERMITTING FILING OF  
AMENDMENT TO AMEND COMPLAINT

For (1) hearing motion of plaintiff, filed Sept. 10, 1948, to file amendment to amended complaint, (2) hearing motion of defendant to continue for further proceedings and argument, and (3) further proceedings on trial and oral argument; L. B. Stanton, Edw. Stanton, and J. L. Welbourn, Esqs., appearing as counsel for plaintiff; E. H. Rowe, Esq., appearing as counsel for defendant.

Attorneys Louis B. Stanton and Rowe argue re motion (2) of defendant for continuance. Court orders motion (1) of plaintiff to file amendment to amended complaint granted, and that said amendment be deemed denied by defendant.

Court orders motion (2) of defendant to continue for further proceedings and argument granted; and orders cause continued to Nov. 8, 1948, 10 a.m., for further proceedings. [52]

[Title of District Court and Cause.]

### DECISION

The above-entitled cause heretofore tried, argued and submitted, is now decided as follows:

Judgment will be for the plaintiff that he recover of and from the defendant the amount equivalent to the difference between the contract price of the glucose contracted for (1.375 pesos per kilo) and the market price as shown by the evidence, as of June 6, 1946, (1.20 pesos per kilo), the day of the repudiation of the contract, the exact amount to be computed in accordance with Local Rule 7(h), in American dollars, at the rate of exchange obtainable in the open market on the date of the judgment.

Findings and judgment to be prepared by counsel for the plaintiff under Local Rule 7. [53]

### Comment

Briefly I indicate the specific findings in the case.

1. I find that a valid contract was entered into by the plaintiff and the defendant. The written communications between the parties set forth fully the essential conditions of the transaction. The mechanics of payment were not a condition precedent to the consummation of the contract, and were not considered such by the parties. More, I am of the view that the office memorandum, dated May 23, 1946, signed by J. B. Donnelly (Plaintiff's Exhibit 58), is a sufficient memorandum embodying all the elements of a valid contract, even if the documents which preceded it were not legally sufficient. (See,

Restatement, Sec. 209; 2 Williston on Contracts, Revised Ed., 1936, Sec. 579; *Moss v. Atkinson*, 1872, 44 C. 3; *McKevitt v. City of Sacramento*, 1921, 55 C.A. 117). The letter speaks of a consummated purchase and of a letter of acceptance which was being sent to Engraw's representative. These statements are not the declarations of a subaltern, but those of an authorized executive whose interpretation of the transaction sets forth clearly its purport.

2. I find that the agreement was repudiated by the defendant on June 6, 1946. The comments at the oral argument sufficiently indicate the basis for this conclusion. It should, however, be said, both as to this and the next finding, that, granting that a party to a contract cannot by repudiation, achieve its unilateral termination, nevertheless when, as here, there is a direct repudiation and denial of the existence of any binding agreement, the other party to the contract is not justified in continuing to make commitments that might change its position. This is especially true, [54] when, as here, it is admitted that whatever discussions took place after this repudiation did not aim at restoring the contract but at liquidating the liability of the defendant through a payment of money to the plaintiff. The next finding is implicit in this.

3. I find that June 6, 1946, is the date as to which the damages should be computed and that the basis of the damage shall be the difference between the contract price of the glucose and the market

price as shown by the record. As already stated, "the damages should be the difference between the contract price and the market price on the date of the final termination of the contract." (Rice v. Schmid, 1941, 18 C(2) 383, 388; Rice v. Schmid, 1944, 25 C(2) 259, 262.)

The situation here is not one in which there is mere refusal to accept an installment delivery. In such case, there is no termination of the contract unless the seller chooses to treat the refusal to accept as ground for termination. Here the contract was repudiated and the defendant specifically denied that any binding contract existed. It is conceivable that, had the plaintiff been induced by the discussions which followed to continue to make purchases, they might insist on a later date as the date of termination. But as that was not done in this case, the contract was at an end on June 6, 1946, and the award of damages for the breach should be made on the basis of the difference between the contract price and the market price of that date.

4. I find that the plaintiff was able to perform the contract and no legal impediment has been shown to exist for its performance. Regardless of the burden of proof, the evidence of an interdiction of export of glucose is, at best, very meagre. There is a showing that some one gave an oral [55] order stopping the export of glucose for a short period of time in line with a certain governmental price policy relating to the cost of living. No official



publication of the order was shown. More, there is no showing that anyone in the Government considered it binding. To the contrary, the evidence shows that during the period of this alleged suspension, the application of the plaintiff for the export license was received. The showing is that, under Argentine law and the custom obtaining, payment of the license does not have to accompany the application, that no notice of action on the application is given unless there is a rejection, and that, in the absence of such rejection, the exporter can pick up the license at any subsequent time when he is ready to export by tendering the fee. There is also evidence in the record that other exporters actually exported glucose during this period. So the upshot of the matter is this: Regardless of any order of cessation of exportation of glucose, the fact remains that glucose was actually exported and that an application for a license to export the glucose involved here was actually received by the proper governmental agency, and not rejected. More, as the alleged order merely suspended for a limited period, its effect, even if proved, would only be to delay performance. Such delay would not destroy the validity of the contract on the ground of frustration. (See, *Patch v. Solar Corporation*, 1945, 7 Cir., 149 F(2) 558.)

Hence the ruling above stated.

Dated this 1st day of February, 1949.

LEON R. YANKWICH,

U. S. District Judge.

[Endorsed]: Filed Feb. 1, 1949. [56]



[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

The above entitled cause having come on regularly for trial in the above entitled Court before the Honorable Leon R. Yankwich on the 1st, 2nd, 3rd, 4th and 9th days of June, 1948, and the 27th day of January, 1949, plaintiff appearing by its counsel, Messrs. Stanton & Stanton, and defendant appearing by its counsel, Messrs. Bronson, Bronson & McKinnon, and evidence, both oral and documentary, having been submitted to the Court, and the Court having received briefs of respective counsel and oral argument, and having ordered judgment in favor of plaintiff, [57] now files its findings of fact and conclusions of law in writing, as follows:

Findings of Fact

1. That it is true that jurisdiction in said action is founded upon diversity of citizenship, and that the amount in controversy herein exceeds the sum of \$3,000.00.

2. That it is true that plaintiff is now and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the Republic of Argentina and having its principal place of business within the City of Buenos Aires, Republic of Argentina.

3. That it is true that defendant is now and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of

the laws of the State of Delaware; that on the 20th day of May, 1945, said defendant filed in the office of the Secretary of State of the State of California, a copy of its articles of incorporation duly certified by the Secretary of State of the State of Delaware, together with a statement showing the location and address of its principal office and the location of its principal office within the State of California, with the name and address of a person within the State of California upon whom process directed to defendant may be served, and its irrevocable consent to service upon said person of process issuing from all courts sitting in said State of California, both State and Federal.

4. That it is true that between the 19th day of May, 1946, and the 25th day of May, 1946, a contract was made and entered into between the plaintiff and defendant under and by the terms whereof plaintiff agreed to sell and deliver to defendant, and defendant agreed to purchase and receive from plaintiff 1135 tons of glucose made from pure crystal corn syrup, testing between [58] 43 and 45 degrees Baume, F.O.B. steamship in the Harbor of Buenos Aires, Argentina, at the price of 1.375 Argentina pesos per kilo, packed in wooden cooperage and containing 660 pounds each on a shipping schedule of 50 tons to be shipped in June, 60 tons to be shipped in July, 200 tons to be shipped in August, 150 tons to be shipped in September, 275 tons to be shipped in October, 200 tons to be shipped in November and 200 tons to be shipped in

December, all in the year 1946; that under the terms of said contract, plaintiff undertook to furnish with each shipment a certificate of analysis showing the glucose in each shipment to be of prescribed specifications, and likewise undertook to furnish a certificate of inspection of cooperage; that under and by the terms of said contract, the total purchase price of said glucose was 1,560,625 pesos; that said defendant agreed to make payment of said total purchase price by a letter of credit bearing expiration date of October 1946, at the exchange rate of 335.82 Argentine pesos to 100 American dollars; that said contract was evidenced by four letters in writing passing between plaintiff and defendant respectively on dates May 20th, May 21st, May 22nd and May 23rd, 1946; that a memorandum in writing embodying all of the terms of said contract was signed by said defendant through and by its agent fully authorized so to do in that behalf on or about the 24th day of May, 1946; that the aforesaid exchange rate was a pegged rate fixed by the Argentine Government applicable only to export purchases of glucose of the kind hereinbefore described and bears no relation to the free rate of exchange nor to the total amount of Argentine pesos which plaintiff was entitled to receive from defendant under said contract as the purchase price.

5. That it is true plaintiff entered into contracts for the purchase on the Buenos Aires, Argentine, market, on the 23rd and 24th days of May, 1946, for the whole of said 1135 tons of [59] glucose in

full and true conformity with the terms of said contract heretofore found, and was at all times ready, willing and able to make delivery thereof on board steamship in the Harbor of Buenos Aires, Argentina, at the delivery dates set forth and prescribed in said shipping schedule heretofore found, of all of said glucose so to be delivered; that it is further true that said plaintiff duly performed each and all of the conditions and provisions under said contract to be performed upon its part.

6. That it is true that on the 6th day of June, 1946, defendant repudiated said contract and advised plaintiff that no contract existed between it and plaintiff.

7. That it is true that during the period June 6, 1946, to September 18, 1946, the parties negotiated for a settlement of any liability which might have existed on the part of defendant to plaintiff. Defendant did not actively or continuously or otherwise negotiate with plaintiff during said period or at any other time for the completion or restoration of said contract or deliveries thereunder but at all times maintained its claim that no contract existed between it and plaintiff and at all times definitely refused to accept any deliveries under or pursuant to said contract. At no time did defendant encourage, induce, or otherwise cause or lead plaintiff to defer or postpone any action it might have taken for the disposal of said glucose. On September 18, 1946, in the City of New York, plaintiff made and delivered to defendant a notice in writing of its intention to resell said 1135 tons of glucose.

8. That it is true that during all of the months from May to December, 1946, inclusive, there was an actual open and public market and established market price in the City of Buenos Aires, Argentina for the purchase and sale of glucose of the kind and quality specified in said contract, both for domestic consumption and for export. There was a difference between the [60] market price for such glucose for domestic consumption and the market price for such glucose for export. Such prices bore no continuing fixed or constant relationship to each other. The established market price for such glucose for and during the whole of the month of June, 1946, for export F.O.B. steamship, Buenos Aires, Argentina, was the sum of 1.35 Argentine pesos per kilo, which market price was 15 centavos higher than the then domestic market price of 1.20 Argentine pesos per kilo. The established market price for such glucose for and during the whole of the month of September, 1946, for export F.O.B. steamship, Buenos Aires, Argentina, was the sum of 1.25 Argentine pesos per kilo, which market price was 15 centavos higher than the then domestic price of 1.10 Argentine pesos per kilo.

Under terms of said contract, the purchase price to be paid to plaintiff by defendant for said glucose for export F.O.B. steamship, Buenos Aires, Argentina, was the sum of 1,560,625 Argentine pesos. The total market price for glucose of the same kind and quality as specified in said contract for export F.O.B. steamship, Buenos Aires, Argentina, on



June 6, 1946, was the sum of 1,532,215 Argentine pesos. The difference between said contract price and said market price was and is the sum of 28,375 Argentine pesos. Plaintiff has been damaged as a direct result of the repudiation of said contract by defendant in said sum of 28,375 Argentine pesos.

9. That it is true that the exchange rate of the U. S. Dollar to the Argentine peso on February 2, 1949, was .206 (4.85 pesos to the Dollar). The damage suffered by plaintiff as aforesaid, computed in U. S. Dollars based upon the said rate of exchange as of said date is the sum of \$5,845.25.

10. That it is true that said market values of said glucose are well established and knowledge thereof was at all times acceptable to defendant; and it is further true that the proof [61] of said market values was clear, certain and uncontradicted, and said damages so found as of said 6th day of June, 1946, were of certain calculation; that interest at the legal rate in California at seven (7%) per cent per annum from the 6th day of June, 1946, to the date of judgment herein is the sum of \$1,103.35.

11. That it is true that plaintiff has been engaged in no other transaction in California than the contract hereinbefore found, and that said contract was one in foreign commerce.

12. That it is not true that the export of glucose from the Argentine Republic to any other republic was prohibited either specifically or otherwise by the laws of the Argentine Republic Nos. 12.591 and



12.830 or by any regulations or orders passed or made thereunder during any of the period during which deliveries pursuant to the terms of said contract, as hereinbefore found, were to be made by plaintiff.

13. That it is true that on the 27th day of May, 1946, the application of plaintiff for license to export 935 tons of said glucose was received by the proper authorities of the Argentine Government, the application of plaintiff for license to export 200 tons of said glucose was thereafter and on the 3rd day of July, 1946, received by said authorities, and no rejection of either application was ever made; that it is also true that during the whole of the period covered by the contract heretofore found, glucose was actually exported from Argentina in large quantities by other exporters.

### Conclusions of Law

From the foregoing facts as found by the Court, the following conclusions of law are drawn: [62]

1. That the parties hereto between the 19th and 25th days of May, 1946, made and entered into a valid contract of purchase and sale, as found in the findings herein, and that a valid memorandum in writing thereof was subscribed by the agent thereunto duly authorized.

2. That defendant repudiated said contract on the 6th day of June, 1946.

3. That the measure of damage for the breach of contract so made by the parties hereto is the

difference between the contract price and the market price on the date of final termination of the contract, that is to say, the amount heretofore found as \$5,845.25.

4. That plaintiff is entitled to recover interest upon said sum from the 6th day of June, 1946, to date of judgment herein at the rate of seven (7%) per cent per annum, and further entitled to recover its costs.

Dated: This 17th day of February, 1949.

/s/ LEON R. YANKWICH,  
U. S. District Judge.

[Endorsed]: Filed Feb. 23, 1949. [63]

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In the District Court of the United States for the  
Southern District of California, Central Division

No. 6223-Y

COMPANIA ENGRAW COMERCIAL &  
INDUSTRIAL S. A., a corporation,  
Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,  
a corporation,  
Defendant.

### JUDGMENT

The above entitled cause having come on regularly for trial in the above entitled Court on the 1st, 2nd, 3rd, 4th and 9th days of June, 1948,

and the 27th day of January, 1949, before the Honorable Leon R. Yankwich, Judge presiding, and plaintiff appearing by its counsel, Messrs. Stanton & Stanton, and defendant appearing by its counsel, Messrs. Bronson, Bronson & McKinnon, and evidence, both oral and documentary, having been submitted to the Court, and the Court being duly advised, ordered judgment for plaintiff and therein has filed its findings of fact and conclusions of law in writing, [64]

Now, Therefore, by reason of the premises and of the findings of fact and conclusions of law aforesaid,

It Is Ordered, Adjudged and Decreed that plaintiff, Compania Engraw Comercial & Industrial S. A., a corporation, have and recover of and from defendant, Schenley Distillers Corporation, a corporation, the sum of \$5,845.25, together with interest from June 6th, 1948, to the date of judgment, in the amount of \$1,103.35, a total of \$6,948.60.

It Is Further Ordered, Adjudged and Decreed that plaintiff, Compania Engraw Comercial & Industrial, S. A., a corporation, do have and recover of and from defendant, Schenley Distillers Corporation, a corporation, its costs herein incurred, hereby taxed in the sum of \$850.70.

/s/ LEON R. YANKWICH,  
U. S. District Judge.

[Endorsed]: Filed Feb. 23, 1949.

Judgment entered Feb. 24, 1949.

Docketed Feb. 24, 1949. [65]

[Title of District Court and Cause.]

NOTICE OF MOTION UNDER RULE 52-b

To Messrs. Bronson, Bronson & McKinnon, Attorneys for Defendant, Mills Towers, San Francisco, California:

Please Take Notice that the undersigned will bring the above motion on for hearing before the Honorable Leon R. Yankwich, a Judge thereof, in the Federal Building in the City of Los Angeles, State of California, on the 14th day of March, 1949, at 10 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard.

Said motion will be made upon the ground that said amendments are necessary to conform the findings to the evidence in said case and will be made upon the files, records and minutes of the Court upon the motion served and filed herewith and the points and authorities attached hereto upon this motion.

Dated: This 3rd day of March, 1949.

STANTON & STANTON,  
By /s/ LOUIS B. STANTON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 4, 1949. [66]

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS  
UNDER RULE 52-b

The plaintiff in the above entitled action moves the Court as follows:

To amend the findings heretofore filed on the 23rd day of February, 1949, in the particulars as hereinafter stated, and to make additional findings, as hereinafter stated, and to amend the judgment accordingly.

(a) Delete the last clause of Finding 4, commencing on Line 24 of said finding and running to the last line thereof, reading as follows:

“That the aforesaid exchange rate was a pegged rate fixed by the Argentine Government applicable only to export purchase of glucose of the amount hereinbefore described and bears no relation to the free rate of exchange nor to the total amount of Argentine pesos which plaintiff was entitled to receive from defendant under said contract as the purchase price.”

(b) Delete that portion of Finding 7, commencing on Line 21 thereof and ending with the word “glucose” on Line 24 thereof, reading as follows:

“At no time did defendant encourage, induce or otherwise cause or [67] lead plaintiff to defer or postpone any action it might have taken for the disposal of said glucose.”

(c) Delete from Finding 8 the phrase commencing on Line 31, page 4, reading as follows:

“Both for domestic consumption and for export.”

(d) Delete from Finding 8, the sentence commencing on Line 32; page 4, reading as follows:

“There was a difference between the market price for such glucose for domestic consumption and the market price for such glucose for export.”

(e) Delete from Finding 8, the sentence commencing on Line 32, page 4, reading as follows:

“There was a difference between the market price for such glucose for domestic consumption and the market price for such glucose for export.”

(f) Delete from Finding 8, page 5, Line 2, the sentence commencing thereon and reading as follows:

“Such prices bore no continuing fixed or constant relationship to each other.”

(g) Delete from Finding 8, page 5, Line 3, the sentence, reading as follows:

“The established market price for such glucose for and during the whole of the month of June, 1946, for export f.o.b. steamship Buenos Aires, Argentina, was the sum of 1.35 Argentine pesos per kilo, which market price was 15 centavos higher than the then domestic market price of 1.20 Argentine pesos per kilo.”

(h) Insert therein the following:

“The established market price for such glucose for and during the whole of the month of June, 1946, was the sum of 1.20 Argentine pesos per kilo; that the fair and reasonable cost of transference from the Buenos Aires market to place on board steamship Buenos Aires and including stevedoring, transportation, cooperage, taxes [68] and all other



expenses incidental to said transfer was the sum of 15 centavos per kilo.”

(i) Delete from Paragraph 8 of the said Findings, the sentence commencing on Line 9, Page 5 thereof, reading as follows:

“The established market price of such glucose for and during the whole of the month of September, 1946, for export f.o.b. to steamship Buenos Aires, Argentina, was the sum of 1.25 Argentine pesos per kilo, which market price was 15 centavos higher than the then domestic price of 1.10 Argentine pesos per kilo.”

(j) As an alternative to the deletion of the sentence set forth in Paragraph (i) last above, delete the figures 1.25 from Line 11, Page 5, and insert in place thereof, the figure “60”; also delete the figure 1.10 in Line 13, Page 5, and insert in place thereof the figure “75”.

(k) Insert in Finding 8, Line 20, Page 5, after the figure “1946”, the following:

“Including cost of transference from Buenos Aires market to on board steamship Buenos Aires Harbor at the rate of 15 centavos per kilo, as heretofore found.”

(l) In Finding 8, Page 5, Line 22, and Line 24, delete the figure “28,375”, and insert in place thereof the figure “28,410”.

(m) In Finding 9, Page 5, Line 29, delete the figure “\$5845.25,” and insert the figure “\$5852.44” in place thereof.

(n) In Finding 10, Page 6, Line 6, delete the

figure "1,103.35", and insert in place thereof the figure "\$1,111.71".

(o) In Finding 12, Page 6, Line 12, delete the word "Republic" and insert the word "country".

(p) Amend said findings by adding thereto the following:

"That it is true that the market price for glucose of said quality and specifications at and in said Buenos Aires market the whole month of June, 1946, was the sum of one (1) peso twenty (2) centavos; that thereafter, commencing with the month of July 1946, the market price broke, so that the market price for glucose of said specifications [69] for the period from the 1st of July, 1946, to the 1st of January, 1947, was the sum of 60 centavos per kilogram; that said market price for glucose of said specifications continued to drop so that in the month of April, 1947, the market price for glucose of said specifications in said Buenos Aires market was the sum of 52 centavos per kilogram; that it is true that the cost of transference of glucose from the Buenos Aires market to free on board steamer in Buenos Aires Harbor, packed ready for delivery and including all costs for taxes, stevedoring, coo- perage and transportation, was the sum of 15 centavos per kilogram."

That the judgment herein be amended in the following particulars:

(a) Strike the figure \$5,845.25 on line 6, page 2 thereof, and insert in place the figure \$5,852.46.

(b) Strike the figure \$1,103.35 in line 8, page 2, and insert in place thereof the figure \$1,111.71.

(c) Strike the figure \$6,946.60, in line 8, page 2 of said judgment, and insert in place thereof the figure \$6,964.17.

STANTON & STANTON,  
By /s/ LOUIS B. STANTON,  
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed Mar. 4, 1949. [70]

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[Title of District Court and Cause.]

NOTICE OF MOTION TO ALTER AND  
AMEND JUDGMENT UNDER RULE 59-e.

To: Messrs. Bronson, Bronson & McKinnon, Attorneys for Defendant, Mills Towers, San Francisco, California:

Please Take Notice that the undersigned will bring the above motion on for hearing before the Honorable Leon R. Yankwich in the Federal Building in the City of Los Angeles, State of California, on the 14th day of March, 1949, at 10 o'clock in the forenoon of that day or soon thereafter as counsel can be heard.

Dated: This 3rd day of March, 1949.

STANTON & STANTON,  
By /s/ LOUIS B. STANTON,  
Attorneys for Plaintiff.

[Endorsed]: Filed March 5, 1949.

[Title of District Court and Cause.]

MOTION TO ALTER OR AMEND JUDGMENT  
UNDER RULE 59-e, F.R.C.

The plaintiff in the above entitled action moves the Court as follows:

That the judgment in the above entitled action be amended and altered in accordance with the findings, prices and market values, as more particularly set forth in the proposed amendment to findings served and filed contemporaneously herewith, under the provisions of Rule 52-b, and that said judgment be altered and amended so as to truly set forth the amount of damages payable to plaintiff herein on the respective dates of deliveries of the glucose, as specified in the contract between the parties hereto and particularly found in Paragraph 4 of the findings herein.

STANTON & STANTON,  
By /s/ LOUIS B. STANTON,  
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed March 5, 1949. [78]

[Title of District Court and Cause.]

ORDER DENYING MOTIONS UNDER  
RULE 52-b AND 59-e.

The above entitled case came on regularly for hearing before the Honorable Leon R. Yankwich, United States Judge, on the 14th day of March, 1949, and Messrs. Stanton & Stanton appearing as attorneys for plaintiff, and Messrs. Bronson, Bronson & McKinnon appearing as attorneys for defendant. After argument and being fully advised in the premises, the Court made an order denying the respective motions, and therefore,

It Is Ordered, Adjudged and Decreed that the motion of plaintiff to alter and amend the findings under Rule 52-b be and it hereby is denied.

It Is Ordered, Adjudged and Decreed that the motion of plaintiff to alter and amend the judgment under Rule 59-e be and it is hereby denied.

Dated: This 21st day of March, 1949.

/s/ LEON R. YANKWICH,  
Judge.

[Endorsed]: Filed March 21, 1949.

Copy received. [82]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above Entitled Court, to Defendant Schenley Distillers Corporation, and to Messrs. Bronson, Bronson & McKinnon, Attorneys for Said Defendant:

You and Each and Every of You Will Please Take Notice that Compania Engraw Comercial E. Industrial S. A., a corporation, plaintiff in the above entitled action, does hereby appeal to the Court of Appeals, for the Ninth Circuit, from that final judgment rendered by the above entitled Court in the above entitled cause, and entered and docketed on the 24th day of February, 1949 in Book 56 of Judgments, at Page 279 thereof, and from the whole of said judgment.

Dated: This 11th day of April, 1949.

STANTON & STANTON,  
By /s/ LOUIS B. STANTON,  
Attorneys for Plaintiff and  
Appellant.

Copy received.

[Endorsed]: Filed April 12, 1949. [83]

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[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that defendant above named hereby appeals to the Circuit Court of Ap-



peals for the Ninth Circuit from the final judgment in favor of plaintiff above named and against said defendant, entered in this action on February 24, 1949.

Dated: April 11, 1949.

BRONSON, BRONSON &  
McKINNON,  
/s/ EDGAR H. ROWE,  
Attorneys for Defendant and  
Appellant.

Receipt of copy acknowledged.

[Endorsed): Filed April 12, 1949. [84]

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF  
RECORD ON APPEAL

To the Clerk of the Above Entitled Court, to Defendant Schenley Distillers Corporation, and to Messrs. Bronson, Bronson & McKinnon, Its Attorneys:

You and Each of You Will Please Take Notice that, in accordance with the provisions of Subdiv. (a) of Rule 75 of the Federal Rules of Civil Procedure, appellant hereby designates portions of the record, proceedings and evidence to be contained in the record on appeal, as follows:

Pleadings and Proceedings

1. Amended complaint.
2. Amendment to amended complaint.
3. Order permitting filing of amendment to amended complaint.
4. Answer to amended complaint.
5. Findings of fact and conclusions of law, together with the direction of the entry of judgment thereon.
6. Opinion of the Court.
7. Judgment.
8. Motion to amend findings under Rule 52-b.
9. Motion to alter and amend judgment under Rule 59-e.
10. Order denying motions under Rule 52-b and 59-e.
11. Notice of appeal with date of filing.

Evidence

1. All original exhibits filed in said action, all of which are hereby requested to be transmitted to the United States Court of Appeals for the Ninth Circuit.
2. Entire Reporter's Transcript of testimony taken on the trial of said action.

That plaintiff and appellant does hereby request, in accordance with the provisions of Rule 75-o

of the Federal Rules of Civil Procedure and in accordance with the provisions of Rule 11-1 of the Rules of the United States Court of Appeals for the Ninth Circuit, that all documents on file in the above entitled Court, as hereinbefore designated, be transmitted under the certificate and seal of the Clerk of the above entitled Court to said United States Court of Appeals for the Ninth Circuit, and form a record on appeal in the above entitled Court.

Dated: This 11th day of April, 1949.

STANTON & STANTON,

By /s/ LOUIS B. STANTON,

Attorneys for Plaintiff and  
Appellant.

[Endorsed]: Filed April 12, 1949. [87]

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[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto that all exhibits introduced in evidence in the above entitled action, together with any depositions on file herein, together with any translations of any of the foregoing, may be transmitted from the District Court of the United States for the Southern District of California to the United States Court of Appeals, Ninth Judicial Circuit.

Dated: April 13, 1949.

STANTON & STANTON,  
By /s/ LOUIS B. STANTON,  
Attorneys for Plaintiff and  
Appellant.  
/s/ BRONSON, BRONSON &  
McKINNON,  
/s/ EDGAR H. ROWE,  
Attorneys for Defendant and  
Appellee.

Copy received.

[Endorsed]: Filed April 13, 1949. [88]

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[Title of District Court and Cause.]

### ORDER

Pursuant to the stipulation of the attorneys for the respective parties hereto, and good cause appearing therefor,

It Is Hereby Ordered that all exhibits introduced in evidence in the above entitled action, together with any depositions on file herein, together with any translations of any of the foregoing, be transmitted from the District Court of the United States for the Southern District of California to the United States Court of Appeals, Ninth Judicial Circuit.

Dated: April 13th, 1949.

/s/ PAUL J. McCORMICK,  
U. S. District Judge.

Copy received.

[Endorsed]: Filed April 13, 1949. [89]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

To the Clerk of the Above Entitled Court, to Plaintiff *Compania Engraw Comercial & Industrial S. A.*, and to Messrs. Stanton & Stanton, Its Attorneys:

You and Each of You Will Please Take Notice that, in accordance with the provisions of Subdiv. (a) of Rule 75 of the Federal Rules of Civil Procedure, appellee hereby designates portions of the record, proceedings and evidence to be contained in the record on appeal, as follows:

Pleadings and Proceedings

1. Original complaint.
2. Defendant's motion to dismiss and order denying same. [90]
3. Amended complaint.
4. Defendant's motion to dismiss and order denying same.
5. Amendment to amended complaint.
6. Order permitting filing of amendment to amended complaint.
7. Answer to amended complaint.
8. Findings of fact and conclusions of law, together with the direction of the entry of judgment thereon.

9. Decision and Comment (opinion) of the Court.

10. Judgment.

11. Motion to amend findings under Rule 52-b.

12. Motion to alter and amend judgment under Rule 59-e.

13. Order denying motions under Rule 52-b and 59-e.

14. Notice of appeal with date of filing.

### Evidence

1. All original exhibits filed in said action, all of which are hereby requested to be transmitted to the United States Court of Appeals for the Ninth Circuit.

2. Entire Reporter's Transcript of testimony taken on trial of said action, including all depositions used or filed.

That defendant and appellee does hereby request, in accordance with the provisions of Rule 75-o of the Federal Rules of Civil Procedure and in accordance with the provisions of Rule 11-l of the Rules of the United States Court of Appeals for the Ninth Circuit, that all documents on file in the above entitled Court, as hereinbefore designated, be transmitted under [91] the certificate and seal of the Clerk of the above entitled Court to said United States Court of Appeals for the Ninth Circuit, and form a record on appeal in the above entitled Court.



Dated: This 13th day of April, 1949.

/s/ EDGAR H. ROWE,  
BRONSON, BRONSON &  
McKINNON,

Attorneys for Defendant and  
Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed April 13, 1949 [92]

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[Title of District Court and Cause.]

#### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 92, inclusive, contain the original Complaint; Notice of Motion and Motion to Dismiss and Motion to Make More Definite and Certain filed February 10, 1947; Amended Complaint; Notice of Motion and Motion to Dismiss and Motion to Make More Definite and Certain and Points and Authorities in Support Thereof filed August 20, 1947; Answer to Amended Complaint; Notice of Motion to File Amendment to Amended Complaint; Amendment to Amended Complaint; Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Motion and Motion to Amend Findings Under Rule 52-b; Notice of Motion and Motion to Alter and Amend Judgment Under Rule 59-e; Order Denying Mo-

tions Under Rules 52-b and 59-3; Separate Notice of Appeal of Plaintiff and Defendant; Plaintiff's Designation of Contents of Record on Appeal; Stipulation; Order re Exhibits; Defendant's Designation of Contents of Record on Appeal and Full, true and correct copies of Minute Orders entered February 24, 1947, August 25, 1947 and September 20, 1948 which, together with original reporter's transcript of proceedings on June 1, 2, 3, 4 and 9, 1948 in eight volumes, original plaintiff's exhibits Nos. 1 to 21, inclusive, 21-A to 21-G, inclusive, 22 to 59, inclusive, 59-A, 60, 60-A to 60-G, inclusive, 61 to 71, inclusive, 71-A and 71-B, original defendant's exhibits A to R, inclusive, R-1 to R-3, inclusive, S, T, T-1, T-2, T-3, U and V, and original depositions of G. Fred Berger, Robert H. Baglin and Harold A. Whipple, in two volumes, transmitted herewith, constitute the record on appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$3.20, one-half of which sum has been paid to me by each of the parties.

Witness my hand and the seal of said District Court this 16th day of May, A.D. 1949.

EDMUND L. SMITH,  
Clerk.

[Seal] By /s/ THEODORE HOCKE,  
Chief Deputy.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto that the time for filing the record on appeal in the above entitled case in the office of the Clerk of the United States Court of Appeals for the Ninth Circuit may be extended to and including the 17th day of June, 1949.

Dated: May 17th, 1949.

STANTON & STANTON,  
By /s/ LOUIS B. STANTON,  
Attorneys for Plaintiff,

BRONSON, BRONSON &  
McKINNON,  
/s/ EDGAR H. ROWE,  
Attorneys for Defendant.

It Is So Ordered.

Dated: May 17th, 1949.

/s/ LEON R. YANKWICH,  
U. S. District Judge.

In the District Court of the United States for the  
Southern District of California, Central Division

No. 6223-Y Civil

COMPANIA ENGRAW COMERCIAL E.  
INDUSTRIAL S. A.,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a  
corporation,

Defendant.

Honorable Leon R. Yankwich, Judge, presiding.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Los Angeles, California

Tuesday, June 1, 1948

Appearances:

STANTON & STANTON,  
LOUIS B. STANTON, ESQ.,  
EDWARD B. STANTON, ESQ.,  
JOHN L. WELBOURN, ESQ.,

For the Plaintiff.

BRONSON, BRONSON & McKINNON,  
E. D. BRONSON, ESQ.,  
EDGAR H. ROWE

For the Defendant.

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(Case called by the clerk.)

Mr. Rowe: May it please the court, before the  
actual commencement of the case I have a motion  
I would like to make, with your Honor's permis-

sion. At this time the defendant Schenley Distillers Corporation, a corporation, moves this court for an order dismissing the complaint and each cause of action thereof upon the ground that neither of the causes of action set forth in the complaint states a claim against the defendant upon which relief can be granted.

This motion is based upon the ground, your Honor, that the complaint in each cause of action is based upon what is alleged to be a written copy. The copy of the contract is attached to the complaint and made a part of each cause of action. The allegations of the complaint go beyond the provisions of what is alleged to be the contract of the document which is attached to the pleading, and it is upon that ground that the defendant contends the action should be dismissed.

If your Honor will look at Paragraph V of the amended complaint, I can point out to you more specifically exactly what the basis of this motion is.

The Court: All right. The amended complaint filed [3\*] August 4th, 1947?

Mr. Rowe: Yes, your Honor.

The Court: What paragraph are you referring to?

Mr. Rowe: Paragraph V; and I might add that Paragraph V is the same in each cause of action, so that the reference to this one will answer the point in the motion as to both. You will notice that Paragraph V of the pleading alleges:

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\* Page numbering appearing at top of page of original certified Transcript of Record.

“That on or about the 23rd day of May, 1946, consequent upon oral and written offers a contract in writing was made and entered into by plaintiff on the one part and defendant on the other part, under and by the terms whereof plaintiff agreed to sell and deliver to defendant, and defendant agreed to purchase and receive from the plaintiff, f.o.b. steamship at Buenos Aires, Republic of Argentina, 1135 tons of glucose, made from pure, crystal clear, corn syrup and testing between 43° and 45° Baume, at 1.375 Argentine Pesos per kilo, packed in wooden cooperage, containing approximately 660 pounds each, and delivered to McCormick Steamship Company at Buenos Aires for carriage to San Francisco or Los Angeles, California, under shipping schedule as follows:”

Reference to the shipping schedule may be omitted for the purpose of this motion. [4]

“and further agreed to make payments for the total purchase price of said glucose on or before the 30th day of October, 1946, at the rate of 335.82 Argentine Pesos to 100 American dollars, and thereby defendant agreed to pay the plaintiff the sum of \$464,-720.68; that a true and correct copy of said contract is hereto attached, marked ‘Exhibit A’ and hereby specifically referred to as if herein set forth at length.” [4-A]

If your Honor will look at Exhibit A which is attached to the complaint and compare its language or its provisions with the allegations, you will note that there are several averments in this Paragraph



V which go beyond the provisions of the Exhibit A. In the first instance, Paragraph V alleges that this is a contract in writing, and it alleges that under and by its terms plaintiff agreed to sell and deliver to defendant, and defendant agreed to purchase and receive from plaintiff. Now, Exhibit A is completely devoid of any language which would impose an obligation upon plaintiff to sell defendant any merchandise whatsoever, glucose or anything else.

Nowhere in Exhibit A is any obligation cast upon plaintiff in anyway, shape, manner or form; and that, your Honor, is the first statement of this allegation which goes beyond the actual provisions of the contract upon which this suit is based.

The second point of divergence which is most apparent is the allegation toward the latter part of Paragraph V, that defendant agreed to pay plaintiff for this glucose at the rate of 335.82 Argentine pesos to one hundred American dollars. There is nothing like that in Exhibit A whatsoever.

The absence of those two material matters in Exhibit A make it necessarily follow that if plaintiff has a contract at all upon which it can complain against defendant, that [5] contract is not a written contract as it is alleged to be in this complaint, but it is actually an oral contract.

The Court: Of course, the answer is two-fold or two-pointed, to be correct. It is not to be handled by a motion of this character because, while the rules say that any matter may be raised at any time which challenges the sufficiency of the claim, the

interpretation of the rule and the practice is to raise the point of sufficiency after the plaintiff's case has been presented, because until that time we do not have the exhibit before the court.

The second point is this: That a mere omission of certain terms or a mere overstatement of the effect of an instrument does not in itself destroy the complaint. Assuming that the contract is one within the statute of frauds, the rules are that if there is an agreement sufficient to bind, and the type of goods, the price and the like, the agreement does not fall by the wayside merely because some detail like manner of payment and the like are missing.

In dealing with contracts relating to personal property we are not bound by the strict rules which obtain if we are dealing, say, with an agreement to buy real property, because there, not only must the property be identified and the price given, but the manner of payment, the manner of security, and the like. This is especially true when the instrument on which they rely is an answer to an offer, and the books are [6] full of cases under the California Statute of Frauds, assuming this is governed by California law, and the California Statute of Frauds in that respect merely follows the general rule that memorandum sufficient to satisfy the requirement of the Statute of Frauds be contained in one instrument. It may be contained in several instruments. So that until we see all the instruments relating to the transaction, this letter just referred to and the other letter of May 21st, we are

not in a position to say whether we have an agreement which is sufficient to satisfy the Statute of Frauds. [7]

Mr. Rowe: Well, my point, your Honor, is a little different from that. Perhaps I have not made myself completely clear, and I don't want to labor it. The complaint is based upon a contract in writing. There is no suggestion that this case is to be presented wherein the plaintiff claims upon an oral contract with the written memorandum to take it under the statute of frauds, and that is the point of our motion.

The Court: We don't have a theory of pleading in California, we have never had it and there is certainly no such thing as a theory of pleading at the present time under the Federal rules—the rule is that regardless of the manner of pleading, if the facts entitle a person to recover, he is entitled to recover, so that even under the California law, if a person can allege a contract within the statute of frauds and then prove a memorandum—

Mr. Rowe: I agree with that theory, and I am not trying to argue that point. All I am trying to argue at this moment is this: If the plaintiff claims he has a written contract with the defendant, that contract obviously is not included in the letter which is attached to the complaint as an exhibit.

The Court: That does not make any difference. If the contract is inadequate, the Court will allow material matters to be supplied. It is not a rule that the man who relies on a contract cannot supply

details, in addition to that, as to [8] the manner, say for instance of payment, so long as it is agreed as to price, and even price is sometimes not material, because if a man says, "I agree to buy this," the presumption is that the current market price will be paid, just as if a person comes to your yard and says, "Your yard needs cutting," and you tell him to go ahead and cut it, the law will presume he wasn't intending to do it—the law will presume you engaged him to do it for compensation and that he will receive the reasonable value therefor.

Mr. Rowe: Yes, your Honor. I am not talking about the manner and various ways in which this thing might have been pleaded, but I am trying to come to the point of the manner in which it has been pleaded.

The Court: It does not make any difference. He pleaded a contract and the memorandum is the written contract.

Mr. Rowe: Aren't we entitled to have a part of the pleading the written offers which go to fill out a contract?

The Court: No, not under our system of pleading. Federal pleading, at the present time is practically notice pleading, and the additional information you may secure by interrogatories, you may secure them by motion for a more definite statement; the Bill of Particulars has just been abolished under the Federal rules which went into effect on the 19th of March. The Bill of Particulars is abolished. But at the time that this action was

instituted, the old [9] rule provided for a Bill of Particulars in a civil case. So that it is not a ground of insufficiency that he does not supply you with all the information that you may need for the purposes of the case, because the broad discovery rule, one of which I have enumerated, the motion for a more definite statement, interrogatories, depositions and the like are at your command, in order to secure the additional information which you may need.

Mr. Rowe: Well, but, your Honor, for the conduct of a trial of a case of this kind, it is obvious, I think, that from our standpoint, the conduct of our case and of our objections, we will call it, to testimony that the plaintiff might offer would be materially different. For example, if this contract were completely in writing, that is it, that is the commencement of it and that is the end of it. If it is partly oral and partly written, it is entirely oral and this document is not the commencement or the end of it.

The Court: Well, that objection comes too late and it does not go to the sufficiency of the pleadings. That objection merely expostulates the proposition that had you been given this information, you might have been prepared on some matters on which you are not prepared. The answer is this: This case has been pending for a year and a half, in fact longer. You have had ample opportunity to use all the agencies of the rules of Civil Procedure, to secure that [10] information.



Mr. Rowe: We have used an awful lot of those rules.

The Court: I know you have. You have. Is there any other point?

Mr. Rowe: No.

The Court: The motion is denied, for the reasons already indicated. All right, proceed, gentlemen.

Mr. L. B. Stanton: Does your Honor desire a statement of the case?

The Court: If you wish to.

The Clerk: Your Honor, there is a motion here, motion plaintiff for preliminary hearing on two of the defenses in answer.

The Court: Well, that we will continue to the presentation of the defendant's testimony. Counsel may raise the points when testimony is offered in support of those defenses. All right.

Mr. L. B. Stanton: If your Honor please, this case is brought upon diversity of citizenship.

The defendant Schenley Distillers Corporation is incorporated under the laws of Delaware.

The amount involved is \$245,000.00.

The plaintiff is incorporated under the laws of the Argentine Republic and found the defendant in this State. The defendant is domesticated in this State and therefore was [11] entitled to be sued here.

The case arises from a contract, as we allege, for the purchase of 1,135 tons of glucose. This contract was initiated—the negotiations were initiated in



May of 1946, by one Harold A. Whipple, who was an export and import agent acting for the plaintiff in vending its merchandise in California.

There were two letters from Mr. Whipple to the Schenley Distillers and there were two letters from Schenley Distillers which will be produced in evidence, which essentially form the elements of the contract to purchase upon which we rely.

Under the contract it was required that the Schenley Distillers forward a letter of credit to the plaintiff in Argentine. This was never done.

On June 6, 1946, the Schenley Distillers, through their agent, Secretary James E. Woolsey, notified Mr. Whipple that they were not going to enter into any contract. There had been notice from the plaintiff to the Schenley Distillers in their headquarters, I presume in Cincinnati, of the details of the contract, by wire.

The plaintiff purchased or had purchased from the exporters in Buenos Aires the required amount of glucose to fill this contract.

Incidentally, I might remark that the proof will show that later, in making the contract about May 28th, there was [12] an oral contract for the purchase of some 400 tons of glucose. We are not counting on that oral contract, because, of course, we appreciate that there was no memorandum in writing. I simply make that statement because the evidence will show that we purchased 1,535 tons of glucose in the Argentine and that accounted for the 400 tons.

This merchandise was purchased in the Argentine under contracts for deliveries as correspond with the delivery dates that are specified in the contract made.

Upon the refusal or—after the June 6th contract, June 6th notification had been made to the plaintiff, plaintiff and Schenley Distillers entered into various negotiations (at least I will term them negotiations). Schenley Distillers sent a man by the name of Emanuel Dichter to Buenos Aires, who investigated the situation there, and they had various correspondence between them.

Mr. Berger, the president of the plaintiff corporation, came to New York and they had consultations there, and those consultations finally developed, on September 20th, in a definite refusal of the Schenley Distillers to take any further action on the contract as we allege.

Various litigation developed between the plaintiff and their suppliers in Buenos Aires, which seems to be immaterial in this case, but, in April of 1947 the merchandise was finally disposed of and at that time the amount of damages [13] were determined.

Now, our rule of measure of damage in this case—it might be interesting to the Court to know at this time—is based upon two California cases, the 18 Cal. (2d) and the 25 Cal. (2d), *Rice v. Schmid*, whereas it is stated that the rule of damage in that case is the difference between the contract price and the market price of merchandise in the place

where it was delivered. Those cases are based, further, upon a case, *Burton Coal Company v. United States*, which went to the United States Court and was so determined.

The Court: Do you gentlemen have anything to present at this time?

Mr. Bronson: Not at this time, your Honor.

The Court: Call your first witness.

Mr. E. B. Stanton: Will the defendant stipulate that the plaintiff is an Argentine corporation?

Mr. Bronson: We haven't any information on it. We understand that you have some record of it. That may go in, without objection.

Mr. L. B. Stanton: I may further state, your Honor, that there will be brought in here various Spanish documents and I have had quite a little difficulty with Spanish translators, and I have translated them myself. They are, of course, subject to approval of counsel. I will furnish counsel with a copy of the translations and I assume if there are any corrections, he can have them made.

The Court: Well, as you know, I know the Spanish language myself and while my spoken Spanish may not be current, my knowledge of written Spanish is pretty extensive and covers the classical language, including the modern variations, may I say, so that it extends—it does not include any knowledge of certain idioms, because I realize in South America some idioms are used. I have just recently read a famous novel from

Venezuela, and there are many idioms there, even by Spanish speaking people. There are two pages of glossary, and of course, when that is the case, then, a person who has learned the language away from the country may not know the idioms, I understand, and I have had a good deal of experience with documents, mostly from Mexico. They are written in what might be called the classical Spanish, and they do not refer to any—do not use any of the idioms.

Mr. L. B. Stanton: I think that is very correct, your Honor.

The Court: So that I will be glad to assist you in any manner I can in checking these translations against the originals.

I know that in one case, a very famous mail fraud case, United States against Carrillo, there were 122 documents and because counsel in that case spoke Spanish, they agreed that I should do the translating and it was quite a difficult job [15] to do it, especially before a jury, because you have to do it very fast. I am merely referring to that, but not as a matter of boasting, gentlemen, but I have spoken several languages so long, it is not a question of boasting. To me, they are merely an aid, an added knowledge that I can use, both for inserts and also for enjoyment, when I have time for enjoyment. So I will be glad to do it. However, if you have any Spanish speaking witnesses, they will have to speak through the official interpreter. I do not allow private interpretations.

Mr. L. B. Stanton: We have no objection.

The Court: All right.

Mr. E. B. Stanton: Mr. Fred Berger. I am calling Mr. Berger for the sole purpose of introducing the articles——

Mr. Bronson: I don't think you need to do that. You have various certificates there. You have a translation, as I said a moment ago.

Mr. E. B. Stanton: You are interposing no objection to the admission of them?

Mr. Bronson: And I don't think you need any identification of that. Just state what they are.

Mr. E. B. Stanton: Then, I file as plaintiff's first exhibit the original, together with translation of the document purporting to be a certified copy of the permit wherein Engraw, plaintiff, operates as a corporation in Buenos Aires, [16] in Argentine.

The Court: All right. It may be received in evidence.

The Clerk: Plaintiff's Exhibit 1 in evidence.

#### PLAINTIFF'S EXHIBIT No. 1

(English Translation)

Translation: S. M. Minister of Justice and Public Instruction of the Argentine Nation.

2 Pesos Documentary Stamp, Canceled.

Rubber Stamp of Department of Justice.

Indistinguishable figures, apparently 541185.

Department of Justice Rubber stamp. The seal of the nation, 2. 18 March, 1948. Buenos Aires, 16th of March, 1945. 16 Mar. 1945.



Exp. n° 7687/944.—

Whereas, request for authorization for the incorporation of the corporation “Compania Engraw Comercial e Industrial S. A.” and the favorable order of the Inspector General of Justice.

In view of the fact that in the organization of said corporation there have been fulfilled the requirements of Article 318 of the Code of Commerce and in further view of the fact that its by-laws and modifications suggested by the Inspector General and accepted by said corporation are in accord with the local requirements and rules now in effect.

The President of the Argentine Nation decrees:  
Art. 1st—Let it be authorized to function as a corporation in view of the fulfillment of Article 319 of said code in the terms of Article 21 of the regulatory decree of the Inspection General of Justice, the corporation “Compania Engraw Comercial E Industrial S. A.,” organized in this capital the 7th day of August, 1944, and let its by-laws from pages 2 to 11 be approved with the modifications made on pages 27 to 29 and 33.

Art. 2nd—Let it be published that it be given to the National Register.

Let there be issued an order for the return of moneys, the deposit of which is evidenced with the ticket on page 16, and the reference of the Inspection General of Justice for its annotation. Issuance of testimony shall effect. Let the pages be returned.



[Indistinguishable signature.]

[Indistinguishable rubber stamp.]

Decree Number 5861-45.

[Indistinguishable signature.]

Minister of Justice and

Public Instruction of the Nation

Rubber Stamp "Copied" Bco. Nation—26—Sallio 3/4/945.

EDUARDO M. VASQUEZ,

Eduardo M. Vasquez, 1st Chief Office  
of the Minister of Justice.

[Indistinguishable signature Rubber Stamp "Inspection 3 Apr. 1945.]

Cer / / / / /

Mr. E. B. Stanton: Mr. Harold Whipple, come forward.

HAROLD A. WHIPPLE

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. E. B. Stanton:

Q. What is your name, please?

A. Harold A. Whipple.

Q. What is your residence address, Mr. Whipple?

A. 1416½ Quintero Street, Los Angeles.

Q. And your business or occupation?

(Testimony of Harold A. Whipple.)

A. Importer and exporter.

Q. By whom are you employed?

A. By myself.

Q. Under what name do you operate?

A. Harold A. Whipple Company.

Q. Where is that located?

A. 228 South San Pedro Street, Los Angeles.

Q. How long have you been operating?

A. Oh, for in excess of 20 years.

Q. Can you explain to the Court, in general, your type of business operations that you maintain? [17]

A. Why, we act in a variety of capacities, as import broker, export broker, as an import merchant and an export merchant. At times we act as exclusive agent for American manufacturers and suppliers. Sometimes we act as agent for foreign suppliers in the California market.

Q. Do you know the plaintiff in this action, Engraw?

A. Yes, sir.

Q. How long have you known of that firm?

A. Since sometime in 1945.

Q. Do you know any of the members of the firm?

A. Yes, sir.

Q. Who?

A. Mr. Fred Berger.

Q. Do you know his position with the firm?

A. President.

Q. Do you know the defendant corporation, the Schenley Distillers?

A. Yes, sir.

Q. Have you had any business dealings with them, any occasion for such?

A. Yes, sir.

(Testimony of Harold A. Whipple.)

Q. In what regard?

Mr. Bronson: I object to that, if it has to do with this contract.

The Court: I will permit it merely to show the relationship. [18] Go ahead.

A. In 1946, in negotiations for sale of glucose.

Mr. Bronson: I did not hear the response.

(Answer read by reporter.)

Q. (By Mr. E. B. Stanton): Approximately when in 1946 did these negotiations take place?

A. It would be in May, about, well, starting in the middle of May.

Q. Where did those activities take place?

A. In Los Angeles.

Q. Prior to that time, prior to about the middle of May of 1946, have you had any dealings in glucose whatsoever?

A. I have had negotiations in glucose, yes.

Q. Here in California? A. Yes.

Q. What type of negotiations?

A. I had negotiated with various manufacturers for the sale of glucose for the account of the Engraw Corporation.

Q. What was your first contact with Schenley Corporation or any member of the Schenley Corporation regarding these negotiations to which you have testified?

A. On May 14, 1946, I received a phone call from a Mr. J. B. Donnelly, who introduced him-

(Testimony of Harold A. Whipple.)

self as being a representative of the Schenley Corporation.

Q. Now, relate to the Court in general as well as you [19] can remember the substance of that conversation.

A. Mr. Donnelly said that he was informed that we had glucose available and he would like in detail what we had to offer. I informed him that we did; and that a short time previously my principals in Buenos Aires had available 1300 tons; that I had had negotiations, in fact at the moment I had negotiations on for 300 tons of it which I would consider under option until those were completed.

Q. You mean to somebody else?

A. To someone else, yes, which would leave, so far as I knew at the moment, 1000 tons available subject to it being still unsold. I gave him a detail of the packing, the specifications, that is, that it was 43 to 45 Baume crystal clear corn syrup.

Q. Just a moment, Mr. Whipple, will you explain what you mean by that, 43 to 45 Baume?

A. I think that is an answer for a chemist, Mr. Stanton. 43 to 45 Baume is the degree of sugar content. How it is determined I would not attempt to say.

Q. I see. Anything further in that conversation?

A. He asked about the price and I gave him an approximate landed price which I told him should

(Testimony of Harold A. Whipple.)

not exceed 22.3 cents a pound. I believe at that conversation or possibly in a succeeding one I explained to him that the purchase would be made f.o.b. Buenos Aires; that the figures I gave him were approximate but that they should not exceed that.

Q. Did you have any discussion relative to delivery schedules?

Mr. Bronson: I did not hear the question.

(Question read by the reporter.)

Mr. E. B. Stanton: Referring to this same conversation.

Mr. Bronson: Now, we will object to that at this time, if your Honor please. This gets into oral matters and details that perhaps they want to tie into a contract pleaded in the manner suggested by Mr. Rowe. We object on the grounds it is incompetent, irrelevant and immaterial, and varying terms of a written contract.

Mr. E. B. Stanton: There has been no variance until the man testifies to the terms of the contract pleaded. [21]

The Court: Very well, overruled.

Mr. Bronson: The court has made a ruling and I feel that we will have to protect ourselves nonetheless, Mr. Stanton.

The Court: Overruled.

Mr. E. B. Stanton: You may answer, Mr. Whipple.

The Witness: Will you repeat the question now?

(Testimony of Harold A. Whipple.)

(Question read by the reporter.)

A. I couldn't say whether we discussed delivery schedule at that conversation or not.

Q. Well, that was the conversation of May the 14th. Did you have any further conversation with Mr. Donnelly or any other member of the Schenley concern?

A. Yes. On the following day I had a phone call from a Mr. Baglin, who introduced himself as Mr. Donnelly's assistant and informed me that——

Mr. Bronson: Now, just a minute. I think you have answered the question.

Q. (By Mr. E. B. Stanton): Incidentally, did Mr. Baglin tell you from where he was telephoning?

A. The operator told me.

Q. And where was that?

A. From San Francisco.

Q. Now will you relate the substance of that conversation of May 15th, that would be, that you had with Mr. Baglin? [22]

Mr. Bronson: We will object again, your Honor, on the grounds stated. And may I suggest to the court, if the testimony of the oral conversation by phone or otherwise between these parties is to be admitted, that we be understood to have a blanket objection?

The Court: That is clear. I am allowing them merely because the letters refer to conversations. Overruled.



(Testimony of Harold A. Whipple.)

Mr. E. B. Stanton: You may answer the question now, Mr. Whipple.

The Witness: What was the question?

(Question read by the reporter.)

A. Mr. Baglin informed me that he was Mr. Donnelly's assistant; he was instructed to carry on in Mr. Donnelly's absence the negotiations with me; that he had been in contact with other departments of the corporation and that they were definitely interested in the purchase of a sizable quantity of glucose. He asked me to repeat for his information the information which I had given previously to Mr. Donnelly. He specifically asked about customs duty, whether that was included in the price and I informed him that it was; and he said that I would hear from him shortly.

Q. Did you hear from him later?

A. On May the 20th I had further phone calls from Mr. Baglin. We discussed the negotiations further.

Mr. E. B. Stanton: One moment, please. Excuse me, Mr. Whipple. Go ahead. [23]

A. He informed me that the Schenley Corporation was prepared to proceed with the purchase of 1,000 tons of glucose and the additional 300 tons which I had previously mentioned as being under option, if it was available, on the basis of information which I had previously given him, and asked me to cable my principals to be certain whether the quantity was still available and the

(Testimony of Harold A. Whipple.)

price still as presented. I asked him if he would confirm the substance of our conversation by letter, and he did.

Mr. E. B. Stanton: I hand counsel what purports to be a copy of a letter of May 20th.

Q. Mr. Whipple, I show you this letter on the stationery of Schenley Distillers Corporation, dated May 20th, and ask if you recognize that?

A. That is correct.

Q. Have you ever seen that before?

A. That is the letter which I received.

Q. Approximately when did you receive that?

A. Probably on May the 21st.

Q. And that is the letter to which you referred when you said that Mr. Baglin would confirm his conversation over the telephone?

A. That is correct.

Mr. E. B. Stanton: I ask that that letter be introduced as Plaintiff's next in order, introduced into evidence. [24]

Mr. Bronson: I would like to ask counsel if he claims that this is part of the contract that you are suing on, rather than Exhibit A which is attached to the complaint?

Mr. E. B. Stanton: I think that counsel is asking me to draw a conclusion which the Judge will draw.

Mr. Bronson: No. I simply asked you that. If you are not answering, I will object, if your Honor please, that it is not the contract they are suing upon.

(Testimony of Harold A. Whipple.)

The Court: Let me see it, please.

Mr. Bronson: Your Honor will remember that Exhibit A is the letter of May 23, 1946. This is the letter of May 20th.

Mr. E. B. Stanton: It is certainly part of the negotiations leading into the contract and confirmation of the witness' testimony. It goes to the intent of the parties to enter into a contract.

Mr. Bronson: Perhaps I can make this suggestion, your Honor, to make the presentation of the Plaintiff's case more orderly and less subject to objection and interruption, that we have our blanket objection to these documents preceding that they set out.

The Court: All right. The objection is overruled.

The Clerk: Plaintiff's Exhibit 2 in evidence.

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PLAINTIFF'S EXHIBIT No. 2

"Schenley Distillers Corporation  
San Francisco 11, California

May 20, 1946

"Harold A. Whipple Company  
316 Commercial Street  
Los Angeles 12, California

"Dear Mr. Whipple:

"This will confirm our telephone conversation of today on the subject of Argentine glucose.

(Testimony of Harold A. Whipple.)

“We are interested in purchasing up to 1,000 tons. Shipments to commence May-1946 (if possible at this date)—50 tons; June through September—100 tons a month; October and November—275 tons a month. If your other prospective buyer exercises his option to purchase 300 tons it is understood 50 tons a month from the above will be directed to him, making a shipping schedule to us—June through September—50 tons a month; October and November—225 tons a month, December—300 tons. Further, if your prospective buyer does not take the 300 tons, we would like the opportunity to purchase this quantity in addition to the 1,000 tons.

“It is understood that we will be purchasing by letter of credit direct from the Argentine shipper, cost to us not to exceed 22.3 cents a pound in wood barrels laid down, tax paid, Pacific Coast port. It is further understood the glucose is crystal-clear obtained by incomplete hydrolysis of cornstarch, 43 to 45 Baume, with a balling of 81.8 upwards.

“Just as soon as you receive a reply to your cable to the shipper, which we understand will be by Wednesday of this week, you will phone this office and advise us that the shipping schedule reflected above can be met.

“We will be expecting information from you which will enable us to issue our purchase order and covering letter of credit. Thank you very

(Testimony of Harold A. Whipple.)

kindly for the consideration you have given this matter.

“Yours very truly,

“SCHENLEY DISTILLERS  
CORPORATION,

/s/ R. H. GAGLIN.

RHB:SR”

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Q. (By Mr. E. B. Stanton): Mr. Whipple, following this telephone conversation of May the 20th did you have any further conversations or contacts with the Schenley Corporation? [25]

A. Yes.

Q. What was that?

A. I had further telephone conversation with Mr. Baglin on May the 21st.

Q. Will you relate the substance of that conversation, please?

A. On May the 21st we discussed further the details of the proposed purchase.

Q. What followed that conversation?

A. I confirmed our conversation by letter.

Q. I show you a letter dated May 21st on the stationery of the Harold A. Whipple Company and ask you if you recognize that letter?

A. Yes; that is the letter which I wrote.

Mr. E. B. Stanton: I will offer this as Plaintiff's next in evidence.

Mr. Bronson: With the understanding, subject to the same objection.

(Testimony of Harold A. Whipple.)

The Court: All right, overruled.

The Clerk: Plaintiff's Exhibit 3 in evidence.

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PLAINTIFF'S EXHIBIT No. 3

"Harold A. Whipple Co.

316 Commercial Street

Los Angeles 12, California

"May 21, 1946.

"Schenley Distillers Corp.

900 Battery Street

San Francisco 11, Calif.

Attn. Mr. R. H. Baglin

"Dear Mr. Baglin:

"Confirming our telephone conversation of today regarding Argentine Glucose we quote from cable received today from our principals in Buenos Aires as follows:

'six hundred tons available price 1.375 (pesos per kilo) require twenty-five per cent down payment balance confirmed credit our order delivery hundred fifty tons monthly starting July answer today will endeavor secure balance if you confirm'

/s/ ENGRAW.

after our phone conversation we have replied as follows:



(Testimony of Harold A. Whipple.)

‘accept 600 tons one thirty seven one half shipments one hundred fifty monthly will accept balance as available same price Schenley Distillers will open credit entire amount but no cash deposit try ship during June cable confirmation’

/s/ WHIPL.

We will advise you immediately we receive their reply.

“As we stated we do not feel that they are justified in asking for a cash deposit as advance payment on a deal of this sort and would have so cabled them even before discussing it with you. We do not think that this will ‘gum up’ the deal and have every expectation that they will confirm promptly and—we hope will be able to complete the 1300 tons for delivery in the last  $\frac{1}{4}$  of the year. to confirm the figures which we gave you:

“The export exchange rate on Argentine pesos is U\$100.00—335.82 pesos or US \$0.29778 per peso at pesos 1.375 per kilogram—US\$0.4094575 per kg.—\$0.18573 per lb. (1 kg —2.2046 lb)

freight rate is \$25 per 40 cu ft—the barrels contain slightly less than 15 cu ft with a net content of 660 lbs approximately. This will give an equivalent of approximately \$0.0142 per lb. Insurance 1.1/2% .30c per 100 lbs .0030. Duty at 2c per lb .02, giving a landed cost est. 22.293 per lb.

(Testimony of Harold A. Whipple.)

The letter of credit should be opened in favor of  
Cia. Engraw Comercial & Industrial, S. A. San  
Martin 329 Buenos Aires,

through the First National Bank of Boston  
Buenos Aires

by cable covering the full amount in pesos at 1.357  
pesos per kilo net FOB Steamer Buenos Aires ex-  
piration Oct 30th 1946 or as confirmed.

“We trust that the foregoing is clear to you and  
that you can arrange your credit to Cia Engraw  
as soon as we advise you that we have their final  
confirmation of the sale.

“Confirming our earlier conversation on this sub-  
ject Cia Engraw has indicated that they will be in  
a position after Jan 1st to furnish from 300 to 500  
tons monthly at the then prevailing market for glu-  
cose and we would appreciate your informing us if  
you would care to book this production for 1947?

“As to quality this glucose is pure corn syrup,  
crystal clear, testing 43 to 45 Baume. We anticipate  
receiving a small sample by air express in a few  
days and will forward it on to you when received.  
Further we suggest that documents to accompany  
drafts under letter of credit should include a cer-  
tificate of analysis as well as a certificate of in-  
spection of the cooperage at time of loading, for  
insurance purposes.

“Thank you for your cordial cooperation in this  
matter and assuring you of our endeavors that this

(Testimony of Harold A. Whipple.)

deal shall work out satisfactorily for all concerned,  
we beg to remain

“Yours very truly,

“HAROLD A. WHIPPLE CO.

By /s/ HAROLD A. WHIPPLE.”

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Q. (By Mr. E. B. Stanton): Now, Mr. Whipple, do you recall anything further about your conversation of May 21st with Mr. Baglin?

A. Yes. I advised Mr. Baglin at that time that I had received a reply from my principals at Buenos Aires offering [26] 600 tons and asking for an immediate reply. I gave him the details of how the purchase should be consummated, to whom the letter of credit should be issued; and because there were so many details, of course, he asked that I should confirm it in writing, which I did, which you have entered.

Q. Mr. Whipple, what was the next thing that happened with respect to these negotiations following that telephone conversation and your sending of this letter?

A. I had another telephone conversation on May the 23rd.

Q. With whom?           A. With Mr. Baglin.

Q. And what was the substance of that conversation?

A. That I had been advised by my principal

(Testimony of Harold A. Whipple.)

that they had 1,135 tons, they had secured 1,135 tons for the Schenley Corporation. I might mention in connection with the May 21st conversation that Mr. Baglin, in accepting the 600 tons, had asked us to secure as much more as possible, therefore, we assumed that the 1,135 tons was—that they would definitely accept if the terms and conditions were the same. However, I confirmed that with Mr. Baglin. He confirmed the acceptance of it.

Q. What did he say?

A. Mr. Stanton, you are asking me what a man said two years ago. [27]

Q. Well, as best you can give it to us.

Mr. Bronson: What conversation is this now, the May 23rd?

Mr. E. B. Stanton: This is the May 23rd.

Mr. Bronson: All right.

A. I can't recall the exact expressions that he used, Mr. Stanton. I can only say that he expressed pleasure at being able to secure the quantity, and said that he would confirm not only the 600 tons I offered him on the previous day but the additional amount and the revised shipping schedule. We discussed the letter which he had written confirming the previous 600 tons. He said that he believed it was already in the mail, but in any event he would confirm the total amount.

Q. Was this conversation followed by any letter?

A. Yes. We received a letter either on the afternoon of the 24th or the morning of the 25th

(Testimony of Harold A. Whipple.)

confirming this conversation, dated May the 23rd, and confirming the purchase of the 1,135 tons as outlined.

Q. Now, Mr. Whipple, do you remember whether or not you wrote to Mr. Baglin again?

A. Yes. On May the 23rd I wrote to Mr. Baglin.

Q. I will show you, first, Mr. Whipple, a letter on the stationery of Harold A. Whipple Company, dated May 23, 1946, and ask you if you can identify that letter? [28]

A. That is correct; that is the letter that I wrote.

Q. To Mr. Baglin?

A. To Mr. Baglin.

Q. And you mailed that to him, did you?

A. I mailed it to him on May the 23rd.

Mr. E. B. Stanton: I ask that that be introduced as plaintiff's next in order of exhibits.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 4 in evidence.

(Testimony of Harold A. Whipple.)

PLAINTIFF'S EXHIBIT No. 4

"Harold A. Whipple Co.  
316 Commercial Street  
Los Angeles 12, California

May 23, 1946.

"Schenley Distillers Corp.  
900 Battery Street  
San Francisco, Calif.

"Attn. Mr. Baglin

"Dear Mr. Baglin:

"Confirming our telephone conversation of this morning we quote the cablegrams received from Engraw in Buenos Aires as follows:

NLT Whipl 5-22

"Acting on your cable twentyfirst have completed firm purchases for account Schenley Distillers elevenhundred thirtyfive tons stop your use night letter lost julyaugustdeliveries offered are working on this stop have closed June delivery fifty tons July sixty augustsept Twohundred September onehundredfifty October twoseventyfive November twohundred December twohundred stop as contract is in Argentine pesos assume purchaser is covering forward exchange more details tomorrow'

/s/ ENGRAW.

LC Whipl 5-23

Urgent arrange immediately credit our order to



(Testimony of Harold A. Whipple.)

cover sixhundred tons stop americanbank cable First Boston here so can meet requirement one supply source market today up five cents”

/s/ ENGRAW.

You will understand that they confirm actual purchase for your account of 1135 metric tons of glucose in accordance with shipping schedule given. That they have committed their personal credit to the suppliers pending receipt of your letter of credit and that they require your credit urgently at the earliest possible moment to satisfy one of their sources of supply who demanded a 25% deposit to hold the lot for you.

Will you please ask your NewYork office to cable the credit as quickly as possible instead of air-mailing same? This is particularly important as the next boat starts loading about the 29th and will sail on June 9.

Your credit should call for a total of 1145 Metric tons approx. before December 31st, allowing partial shipments, and your purchase order should show the shipping schedule given “or more.” We have cabled them again tonight asking them to try to improve the June July deliveries.

We await your confirming letter which you stated is in the mail today. Thank you for your cooperation.

Yours sincerely,

HAROLD A. WHIPPLE CO.

/s/ HAROLD A. WHIPPLE.

(Testimony of Harold A. Whipple.)

Q. (By Mr. E. B. Stanton): Now, Mr. Whipple, I show you a letter on the stationery of the Schenley Distillers Corporation, dated May 23rd, addressed to "Harold A. Whipple Company, attention H. A. Whipple," signed by "J. B. Donnelly" for the Schenley Distillers Corporation and ask you if you recognize that letter?

A. Yes, sir.

Q. That is the letter you referred to as receiving on the 24th or 25th?

A. That is the letter which we accepted as a contract.

Mr. E. B. Stanton: I ask that this be introduced into evidence as plaintiff's next in order.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 5 in evidence.

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PLAINTIFF'S EXHIBIT No. 5

Schenley Distillers Corporation

850-900 Battery Street

San Francisco 11, California

May 23, 1946.

Harold A. Whipple Co.

316 Commercial Street

Los Angeles 12, California

Attention: Mr. H. A. Whipple

Gentlemen:

This will confirm our telephone conversation and your letter of May 21st.

We hereby acknowledge the offer of Cia. Engraw

(Testimony of Harold A. Whipple.)

Comercial & Industrial S. A., of 600 tons of glucose made from pure corn syrup, crystal clear, and testing between 43 and 45 Baume, at a price of 1.375 pesos per kilogram. The price listed is f.o.b. steamer, Buenos Aires, packaged in wood cooperage containing approximately 660 pounds each. Shipment is to be made via McCormick Steamship Co. to San Francisco or Los Angeles.

A purchase order will be sent to Cia. Engraw Comercial & Industrial S. A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos. Expiration date will be October 30, 1948, or as confirmed. Shipment of this material is to be at a rate of 150 tons a month.

All correspondence will be handled via air mail instead of regular mail, in order to speed this matter.

Very truly yours,

SCHENLEY DISTILLERS  
CORPORATION,

By /s/ J. B. DONNELLY.

JBD:LP

P. S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial S. A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; September—150; October—275; November—200; December—200. The conditions of acceptance of this quantity are the same

(Testimony of Harold A. Whipple.)

as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing.

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Mr. E. B. Stanton: I now wish to call attention of the court to a stipulation in the file regarding evidence, which, [29] for the sake of the record, the defendant has stipulated:

“That in case it be determined that the letter dated May 23, 1946, Exhibit ‘A’ attached to the amended complaint, together with the oral and written offers and negotiations precedent thereto, is held to constitute a contract between plaintiff and defendant, then and in that event such contract was within the authority of said J. B. Donnelly to consummate and make for and on behalf of defendant corporation, that no point is or will be made upon the trial of the action herein and that the authority of said J. B. Donnelly to enter into or make such a contract was not in writing, or that he was in any other way not authorized to consummate or make such a contract.”

I ask that that stipulation in the file be introduced into evidence.

The Court: All right.

The Clerk: Shall I give it a number?

The Court: It will be received.

The Clerk: What is the date of that stipulation?

The Court: Mark it as an exhibit.

(Testimony of Harold A. Whipple.)

Mr. E. B. Stanton: That will be somewhere in September of 1947. Our copy here is not dated.

The Clerk: Is it the stipulation on evidence filed September 22, 1947? [30]

Mr. E. B. Stanton: Yes; that is right.

The Clerk: That is marked Plaintiff's Exhibit 6 in evidence.

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PLAINTIFF'S EXHIBIT No. 6

In the District Court of the United States, Southern  
District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E IN-  
DUSTRIAL S. A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a  
corporation,

Defendant.

STIPULATION ON EVIDENCE

It Is Hereby Stipulated and Agreed, by and between the above-entitled parties, through and by their respective counsel of record, here undersigned, as follows:

I.

That J. B. Donnelly, between the 10th day of May, 1946, and the 7th day of June, 1946, was an executive officer of the defendant corporation.

(Testimony of Harold A. Whipple.)

II.

That between said dates he was invested with full authority by defendant corporation to negotiate and consummate any and all purchases such as that alleged in plaintiff's complaint, and to bind defendant corporation thereto.

III.

That in case it be determined that the letter dated May 23, 1946, Exhibit "A" attached to the amended complaint, together with the oral and written offers and negotiations precedent thereto, is held to constitute a contract between plaintiff and defendant, then and in that event such contract was within the authority of said J. B. Donnelly to consummate and make for and on behalf of defendant corporation, that no point is or will be made upon the trial of the action herein and that the authority of said J. B. Donnelly to enter into or make such a contract was not in writing, or that he was in any other way not authorized to consummate or make such a contract.

IV.

This stipulation is made without prejudice to the maintenance by defendant of the defense that whatever was done or performed by the parties hereto was insufficient to constitute a contract under



(Testimony of Harold A. Whipple.)

the provisions of the applicable statute of frauds, or otherwise.

STANTON & STANTON,  
By /s/ LOUIS B. STANTON,  
Attorneys for Plaintiff.  
BRONSON, BRONSON &  
McKINNON,  
By /s/ EDGAR H. ROWE,  
Attorneys for Defendant.

---

Q. (By Mr. E. B. Stanton): Now, the last conversation you have related, Mr. Whipple, was the conversation of May 23rd. Did you have any further conversation?

A. Yes. On May the 24th I talked——

Q. Who was that conversation with?

A. I talked again with Mr. Baglin specifically with regard to the issuance of the letter of credit.

Q. What was the substance of that conversation if you recall?

A. That it was reported to my principals that the letter of credit be issued as speedily as possible; that the amount involved was a very large amount and they needed the letter of credit at the earliest possible moment. Mr. Baglin assured me that the necessary information had already been forwarded to their eastern office for processing; that the letter of credit was being processed there as rapidly as possible, but it was doubtful they could issue the letter of credit before Monday, May the 27th.

(Testimony of Harold A. Whipple.)

Q. Did you have any further telephone conversations on that day with Mr. Baglin or with anyone else?

A. It is possible that I had another conversation either later on May the 24th or the morning of May the 25th [31] with Mr. Baglin at which we discussed a further offer of glucose from my principals which could be obtained at an increased price. However, giving them additional quantities for delivery during July, August, and September, in which they were greatly interested. Mr. Baglin——

Q. Now, Mr. Whipple, did you have any correspondence with your principals or did you receive any correspondence from your principals confirming this 1,135 tons?           A. Yes.

Q. About when?

A. I received a cable. I cabled them confirming the purchase by Schenley Distillers and forwarded a confirmation of the cable on the same day.

Q. Mr. Whipple, I show you this cable dated May 23rd, 1946, and ask if you recognize that, the wording therein?

The Court: Before you proceed I want to identify the stipulations which have been marked as Plaintiff's Exhibit 6. It is in the file and it was filed on September 22, 1947. It does not bear the date of execution, but that is the date on which it was filed.

A. This is a cable which I received on May the 23rd from Buenos Aires, signed by Engraw.

(Testimony of Harold A. Whipple.)

Mr. E. B. Stanton: I ask that this be introduced as plaintiff's next exhibit in order.

The Court: All right. [32]

The Clerk: Plaintiff's Exhibit 7 in evidence.

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## PLAINTIFF'S EXHIBIT 7

Western Union Telegram

1946 May 23 AM 2:59

NB114 Intl CD Baires Via Allamerica 70/69 1/50 22  
NLT Whipl

Losa

(Harold A. Whipple Co.)

(316 Commercial St., Room 208)

Acting on your cable twentyfirst have completed firm purchases for account Shenley Distillers elevenhundred thirtyfive tons stop Your use night letter lost July August deliveries offered are working on this stop Have closed June delivery fifty tons July sixty AugustSept two hundred September onehundredfifty October twoseventyfive November twohundred December twohundred stop As contract is in Argentine pesos assume purchase is covering forward exchange more details tomorrow.

ENGRAW.

---

Q. (By Mr. E. B. Stanton): Following the 24th or 25th that you have mentioned your conversations

(Testimony of Harold A. Whipple.)

with Mr. Baglin, did you have any further contact or communication with the Schenley Corporation concerning glucose?      A. Yes.

Q. Now, about when?

A. On May the 28th I talked by telephone again with Mr. Baglin.

Q. And what was that conversation if you recall?

A. We again discussed the letter of credit. I had had information that my principals had not yet received advice of the credit. I asked Mr. Baglin if he knew whether the credit had been issued and if he could give me the name of the bank who issued the credit and the credit number. He informed me that he was certain that the credit had been issued the previous day or was being issued that day; that they would either use the Chase National Bank or the Bankers Trust Company in New York; that he would ask New York definitely for the bank and the credit number and advise me by telephone.

Q. Anything further in that conversation?

A. Yes. We also discussed, either in that conversation or one an hour or so later—I think we had two on that day—we also discussed an additional offering of [33] 200 to 400 tons of glucose of which I had received cable offer from my principals.

Q. Now, one moment, Mr. Whipple.

A. The terms and conditions being the same, he accepted.

(Testimony of Harold A. Whipple.)

Q. He accepted what?

A. He accepted the offer.

Q. Mr. Whipple, I show you a cable addressed to Whipple, signed "Engraw," bearing stamp date May 28th and ask you if you will identify that?

A. Yes; that is the cable which I received.

Q. That is the cable which you referred to?

A. Which I referred to as the offer.

Q. In your conversation with Mr. Baglin?

A. Yes, sir.

Mr. E. B. Stanton: I ask that this be introduced as plaintiff's next exhibit.

Mr. Bronson: May we inquire the purpose before it is ordered admitted and marked?

Mr. E. B. Stanton: Yes, Mr. Bronson. When we will show the supplier's contracts on this matter of supplier's contracts, they will total, as was given in the opening statement, a matter of 1,535 tons rather than 1,135 tons.

Secondly, in the matter of disposal of the glucose, it will show disposal of 1,535 tons rather than 1,135 tons. [34] And while we wish to show this is part of the same transaction, but we are making no claim to the 400 tons.

Mr. Bronson: It is merely explanatory, in other words, of some evidence that you are bringing out later?

Mr. E. B. Stanton: That is right.

Mr. Bronson: We will withhold any objection now to the offer in view of the statement of counsel.

(Testimony of Harold A. Whipple.)

The Court: All right.

The Clerk: Admitted?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 8 in evidence.

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PLAINTIFF'S EXHIBIT 8

Western Union Telegram

JB 306P 1946 May 28 PM 2:46

DU453 Intl CD Baires Via Allamerica 20/19 28  
431P

LC Whipl

(Harold A. Whipple Co., 316 Commercial St)

(Room 208)

Losa

Firm offer till twentyninth twohundredtons one-  
thirty fifty monthly July October possibility double  
quantity same price.

ENGRAW.

---

Q. (By Mr. E. B. Stanton): Following this con-  
versation with Mr. Baglin did you have any cor-  
respondence with Engraw concerning the offer?

A. Yes.

Q. What was that and what did you do?

Mr. Bronson: Will you fix the time of it if you  
can, please?

Q. (By Mr. E. B. Stanton): I am referring to  
the conversation of May 28th to which you have just



(Testimony of Harold A. Whipple.)

testified. At or about that time what did you do, if anything?

A. I cabled Engraw.

Q. Do you remember about when?

A. The same date.

Q. I show you what purports to be a cable on the Western [35] Telegraph Company, Ltd. with a receipt date of May 29th, addressed to Engraw and signed "Whipple," and ask you if you recognize the wording in that wire?

A. That is correct. That is the night letter which I sent out on the 28th.

Mr. E. B. Stanton: I ask that this be introduced as plaintiff's next exhibit in order.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 9 in evidence.

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## PLAINTIFF'S EXHIBIT 9

The Western Telegraph Company Limited

Telegrama No. 00158

Whl211 LosAngeles Calif 44 28

NLT Engraw Baires

Accept two hundred four hundred tons offered requires one week clear credit confirm stop Subject successful conclusion present negotiations Schenley prepared negotiate 1947 production ieixed price basis stop Can arrange two weeks extension trucks if you advise confidence successful conclusion.

WHIPL.

(Testimony of Harold A. Whipple.)

Q. (By Mr. E. B. Stanton): Now, following that cable did you receive any word from Engraw?

A. Yes. I had a series of——

Q. I am referring to this 400-ton matter.

A. Yes. I received a cable on the following day, I believe.

Q. I show you a cable on the Western Union Cable stationery, dated May 29th, Whipple to Engraw, and ask you if you recognize that?

A. Yes, sir; that is the cable I received.

Mr. E. B. Stanton: I ask that this be introduced as plaintiff's next exhibit in evidence.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 10 in evidence.

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PLAINTIFF'S EXHIBIT 10

Western Union

WB 9:56 AM

1946 May 29 AM 9:37

CDU230 Intl CD Baires Via Allamerica 20 29 12  
18P

LC Whipl

Losa

(Harold A. Whipple Co.)

(316 Commercial St.)

(Rm. 208)

Acting your twentyeight completed purchases  
fourhundred onehundred monthly July October ar-  
range credit stop Trucks pending decision.

ENGRAW.

(Testimony of Harold A. Whipple.)

Q. (By Mr. E. B. Stanton): Up to this time in these conversations that you have testified to was there any discussion [36] concerning the matter of samples; that is, when I say "up to this time" I am referring up to—I will limit that—say, the 25th of May?

A. The question of sample may have been discussed incidentally; however, not as any condition of the execution of the contract.

Mr. Bronson: I submit that was a conclusion, if your Honor please.

The Court: Yes; that may have been. Strike that.

Q. (By Mr. E. B. Stanton): You do not recall specifically then, anything that you could tell us about now? A. No, sir.

Q. Following the 25th of May did you have any conversations concerning samples? A. Yes.

Q. With whom?

A. With Mr. Baglin.

Q. About when?

A. About May the 28th or 29th.

Q. Can you relate the conversation as best you can recall?

A. Mr. Baglin said that his Cincinnati office was very anxious to obtain a sample. I explained to him that we had no sample in hand; we had had a sample previously which had been submitted to other clients and we had a [37] letter from Engraw stating that a sample was being forwarded; we

(Testimony of Harold A. Whipple.)

would be glad to furnish that sample as soon as it was received or, if we were able to obtain return of the sample we had from our previous clients. I also explained to him that glucose was standard merchandise, was regularly sold on laboratory analysis, and that we would expect to furnish a laboratory analysis showing that the glucose conformed to the specifications set forth in the contract.

Q. (By Mr. E. B. Stanton): Was there any further conversation or did you do anything with reference to a sample of any kind?

A. I had conversations with Mr. Baglin on June 3rd, the 4th and 5th.

Q. And what were these conversations, if you recall, can you give them specifically?

A. I cannot give you specifically the details of each conversation. I know that they definitely were concerned seriously with the failure of Schenley to furnish the letter of credit; and on June 5th, I advised Mr. Baglin that I had received the sample from one of my clients in the United States and he gave me instructions, either at that time or the day previously, where to forward that sample.

Q. And what did he tell you in that regard?

A. He told me to forward that immediately to Many Blanc Company in Chicago.

Q. Did you do so?

A. I did so. On June 5th, I accompanied it by registered air mail, return receipt requested; I accompanied it by a letter of transmittal. I sent a copy of the letter of transmittal to Mr. Baglin.

(Testimony of Harold A. Whipple.)

Mr. E. B. Stanton: Do you have those?

The Court: While we are waiting, let us take a short recess, gentlemen. [39]

(Whereupon a short recess was taken.)

Mr. E. B. Stanton: Will the reporter read the last question and answer?

(Record read by reporter.)

Q. Mr. Whipple, I show you what purports to be in partially copy and partially in original, letter dated June 5th on the stationery of Harold A. Whipple, bearing a signature at the bottom. Can you identify this particular document I am showing you?

A. Yes. This was a copy of the letter to Many Blanc and at the bottom is a footnote, which I added on the copy to Mr. Baglin.

Q. Then, what would this have been, this particular letter?

A. This was a copy of the letter of transmittal to the Many Blanc Company, the original of course having gone to Many Blanc.

Q. And is this the copy which you sent?

A. This is the copy which I sent to Mr. Baglin.

Mr. E. B. Stanton: I ask that this be introduced in evidence as Plaintiff's exhibit next in order.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 11 in evidence.

(Testimony of Harold A. Whipple.)

PLAINTIFF'S EXHIBIT 11

(Stamped June 6, 1945)

(Letterhead Harold A. Whipple Co.)

June 6, 1945

Many Blanc & Co. Inc.

3414 West 48th Place

Chicago 32

Ill.

attn Mr. Bayles

Dear Sir:

in accordance with request received from Mr. Baglin, Schenley Distillers Corp. San Francisco, we are sending you via airmail, registered, a small sample of Argentine Glucose which has been submitted by our principal in the Argentine as a representative sample of the glucose which they will ship to Schenley Distillers.

We trust that you will expedite the examination of this sample and render your report without delay.

Yours very truly,

HAROLD A. WHIPPLE CO.

By /s/ HAROLD A. WHIPPLE.

HAW/H

copy to Schenley San Francisco

2 copies to Engraw

Mr. Baglin:

the above sample is the one mentioned in our conversation as received earlier from Engraw and



(Testimony of Harold A. Whipple.)

which has just been returned to us by our client in the northwest. It just came in a few moments ago, and we hasten to forward it on to Chicago. In the meantime we are looking forward to receiving from you confirmation of specifications which will meet the approval of your Cincinnati office as understood in our phone conversation of this morning.

HAROLD A. WHIPPLE CO.  
HAROLD A. WHIPPLE.

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Mr. E. B. Stanton: Now, for the record, I have asked the defendant to produce, pursuant to notice, the original [40] letter to Many Blanc Company. Counsel have informed me that they are not in possession of the original letter, however, that they are willing at this time to stipulate that the original letter, which is shown by the carbon copy on this Plaintiff's Exhibit 11, was actually received by the Many Blanc Company; is that correct?

Mr. Bronson: Well, that is the information that we don't have. But we will not offer any objection to your offering the entire exhibit and I understand that you have there a return receipt on registered mail, a registered letter to Many Blanc.

Mr. E. B. Stanton: Our stipulation, I understood, called for a bit more than that. I wished to have a stipulation that Many Blanc actually received the letter.

(Testimony of Harold A. Whipple.)

Mr. Bronson: Well, I can't do that. We have never found—or we haven't been supplied, I better put it, with any letter received by Many Blanc, but we have been supplied with the document that you have just handed to the witness.

Mr. E. B. Stanton: I see. That was given to you, then, by the Schenley Distillers Corporation.

Mr. Bronson: Well, it was given to us by the party to whom the postscript is addressed, Mr. Baglin. It came from his file. We haven't any record of Many Blanc receiving the original.

Mr. E. B. Stanton: Now, Mr. Whipple, I show you what [41] purports to be a return receipt card on the stationery of the Post Office Department, which bears a mailing date, addressed to you, of June 8, 1946, and ask you if you can identify that.

A. This is a return receipt signed by Many Blanc & Company and dated June 6th.

Q. That is the date of receipt?

A. That is the date of receipt by Many Blanc & Company. This was attached to the registered package containing the sample of glucose.

Q. I believe you testified, wasn't it a fact, that you had requested a return receipt.

A. That is correct.

Mr. E. B. Stanton: I ask that this be offered in evidence as Plaintiff's exhibit next in order.

The Court: All right, it may be received.

The Clerk: That is Plaintiff's Exhibit 12 in evidence.

(Testimony of Harold A. Whipple.)

PLAINTIFF'S EXHIBIT 12

Post Office Department

Official Business

(Stamped) Chicago, Ill.

Jun 8 1946 10 AM

Return to Harold A. Whipple Co.

316 Commercial St.

Los Angeles 12,

California

Registered Article No. 98333

Insured Parcel

(On reverse side of card)

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1 Many Blanc & Co.

2 R. Dishler

(Dated of Delivery 6-6-1946

---

Mr. Bronson: Before we go any further on that matter, did the witness testify that the signature on there is the signature of Many Blanc? Do I understand you correctly to say—or rather, that it says Many Blanc there?

A. It says Many Blanc & Company, sir.

Mr. Bronson: All right.

The Court: All right. Go ahead.

Q. (By Mr. E. B. Stanton): Now, following the sending of that Many Blanc letter, a carbon of

(Testimony of Harold A. Whipple.)

which you sent to Mr. [42] Baglin as you have testified you mailed on or about June 5th, did you have any further contact with anyone contacted with the Schenley organization?

A. Yes. On June 6th I received a telephone call from a gentleman who introduced himself as Mr. Woolsey of Schenley Distillers Corporation.

Q. Did Mr. Woolsey tell you what position, if any, he held in the Schenley Distillers Corporation?

A. I don't recall that he did, Mr. Stanton, in the conversation.

Q. What was the substance of that conversation, that you recall?

A. He informed me that in connection with the negotiations for glucose, that his company did not intend to fulfil their contract. I objected, that I had Mr. Donnelly's firm contract in hand; that my principals had already covered the necessary purchases and that they just couldn't do that.

He informed me that Mr. Donnelly was not a responsible officer of the Schenley Corporation. In that case I asked him to have a letter signed by a responsible officer of the Schenley Corporation, addressed to me, setting forth what he intended to do and his reasons for doing so.

Q. Now, did you receive such a confirmation of that conversation?

A. The only confirmation which I received was a [43] telegram on the following day, June 7th.

Mr. E. B. Stanton: Now, one moment.

(Mr. Stanton hands document to Mr. Rowe.)

(Testimony of Harold A. Whipple.)

Q. I show you a telegram dated June 7, 1946, Western Union, Harold A. Whipple Company, signed Schenley Distillers Corporation by James E. Woolsey, Assistant Secretary, and ask you if you recognize that wire.

A. That is the wire which I received.

Mr. E. B. Stanton: I ask that this be introduced as Plaintiff's exhibit next in order, in evidence.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 13 in evidence.

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### PLAINTIFF'S EXHIBIT 13

Western Union

TD07

T. FC 304 DL PD: SanFrancisco Calif 7 1135A

Harold A. Whipple Co.

316 Commercial St.

Losa

Following our telephone conversation of yesterday, and in response to your request that said conversation be confirmed in writing. We advise that we are not entering into any agreement with CIA Engraw Commercial and Industrial SA for the purchase of lucose.

SCHENLEY DISTILLERS  
CORPN.,

By JAS. E. WOOLSEY,  
Assistant Secretary.

CIA SA

(Testimony of Harold A. Whipple.)

Mr. Bronson: What was the date of that?

Mr. E. B. Stanton: June 7th.

Q. Mr. Whipple, did you communicate the contents of this wire to your principals?

A. I did.

Q. When.

A. On or about the same date.

Q. I show you an original telegram, Western Telegraph Company, Limited, addressed to Engraw, Buenos Aires, signed Whipple, showing a receipt date June 7th in Buenos Aires, and ask you if you recognize the contents of this wire?

A. That is correct. That is a wire I sent, following telephone conversation with Mr. Woolsey.

Q. That would be on June 6th?

A. On June 6th.

Mr. E. B. Stanton: I ask that this be introduced as Plaintiff's Exhibit next in order, in evidence.

The Court: All right, it may be received.

The Clerk: Plaintiff's Exhibit 14 in evidence.

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## PLAINTIFF'S EXHIBIT 14

The Western Telegraph Company Limited  
WLH148 LosAngeles Cal 47 6  
NLT Engraw Baires

Schenley legal department SanFrancisco phones  
advise Cincinnati refuses complete contract claim-  
ing no contract because formal purchase order and  
credit not issued stop Effectively repudiates signa-



(Testimony of Harold A. Whipple.)

ture their San Francisco employee stop We requested responsible official put cancellation in writing stating reasons doubtful they will comply.

WHIPL.

---

Q. (By Mr. E. B. Stanton): At or about this time, Mr. Whipple, did you have any further or other communication with your principal, Engraw?

A. Yes. I followed the cable with a letter setting forth all of the details of the transaction up to that time.

(Mr. E. B. Stanton hands documents to defendant's counsel.)

Mr. E. B. Stanton: You may have a copy, Mr. Rowe.

Q. Mr. Whipple, I show you now what purports to be your original letter, on the stationery of Harold A. Whipple Company, bearing the date of June 6, 1946, signed Harold A. Whipple. I call your attention to that signature. Is that your signature?

A. Yes, sir.

Q. Now, is that the letter to which you referred when you said that you had sent confirmation to Engraw?

A. That is correct. [45]

Q. Now, I call your attention to the first paragraph, reading——

Mr. Bronson: Wait a moment. You have not offered it in evidence yet.

Mr. E. B. Stanton: I will offer this letter——

(Testimony of Harold A. Whipple.)

Mr. Bronson: We will object to it on the ground it has nothing to do with the matter.

Mr. E. B. Stanton: I offer this letter into evidence as plaintiff's next exhibit.

Mr. Bronson: We will object to it, if your Honor please, on the ground it has nothing to do with the matter under dispute. It is a vituperative sort of characterization containing the witness' signatory.

Mr. E. B. Stanton: I might mention to the court that the primary purpose of this letter is to connect up by showing the—the letter itself states that the contract, or what we take the position is a contract, was sent to the principals, and shows this letter is——

Mr. Bronson: We will stipulate that you sent the original down there. That is little excuse for putting that kind of thing in evidence.

Mr. E. B. Stanton: Will you also stipulate, then, that the knowledge of the refusal to complete the contract was similarly transmitted to Engraw?

Mr. Bronson: We can't enter into a stipulation that [46] has anything to do with a contract.

Mr. E. B. Stanton: Then I have to insist upon my letter showing transmittal of the information, Mr. Bronson.

Mr. Bronson: The information is different from calling it a contract.

Mr. E. B. Stanton: Will you stipulate, Mr. Bronson, that a copy of the letter of May 23rd,

(Testimony of Harold A. Whipple.)

signed by Mr. Donnelly, was hereby sent to Mr. Berger?

Mr. Bronson: I don't know anything about that.

Mr. E. B. Stanton: Then I maintain the letter is evidenciary for that purpose.

Mr. Bronson: I suggest, counsel, that that is rather a dim ground for putting in this kind of argument between——

The Court: I think, gentlemen, in view of the stipulation which I have just read again, which admits authority on the part of Donnelly to consummate a deal, this letter, which is rather strong in its language in characterizing the defendant, would be, at most, proof that they received the contract, and is not material because, if they stipulate, as they have under this stipulation, that Donnelly has authority to bind them, the only question that remains so far as the contract is concerned is the proof of its terms.

I will sustain the objection to this. You may have it marked for identification if you so desire.

Mr. E. B. Stanton: Thank you, your Honor. We desire to have that so marked. [47]

The Court: Do you want it so marked?

Mr. E. B. Stanton: Please.

The Court: It may be marked for identification only.

The Clerk: Plaintiff's Exhibit 15 marked for identification only.

(Testimony of Harold A. Whipple.)

PLAINTIFF'S EXHIBIT NO. 15

(Letterhead Harold A. Whipple Co.)

June 4, 1946

Cia Engraw  
San Martin 329  
Buenos Aires  
Argentine

attn Mr. Berger

Dear Mr. Berger:

Enclosed are final telegram confirmations on the Schenley double x. also, copy of letter of commitment for the purchase dated May 23rd from Mr. Donnelly of their Sanfrancisco office—and letter of transmittal of the sample which we were able to recover from a former prospect and forwarded to Many Blanc at Baglins request (Baglin is asstant to Donnelly).

The refusal to complete the deal came over the phone this noon in reply to my demand yesterday to Baglin that Cincinnati furnish us with specifications on which they would go through with the purchase without waiting for the arrival of the samples.

In effect I told Baglin over the phone that the manner in which they were "horsing around" aout issuing their purchase order or furnishing specifications on which they expected to judge the glucose "smelled to high heaven of a stall until they could find a way to wiggle out of the deal if they

(Testimony of Harold A. Whipple.)

wanted to do so." He promised that he would have Cincinnati furnish a statement that they would go through with the deal if samples met such specifications as Cincinnati would furnish—today. Instead Cincinnati wired or phoned their legal department in Frisco to get them to wiggle clear of the deal. As you can see most of the exchanges on this matter have taken place over the phone and we have in writing nothing from Cincinnati—only the enclosed letter from Donnelly San Francisco. Donnelly however is a department manager or something of the sort—but as their attorney pointed out not "an official of the Corporation."

It seems obvious that upon learning that they could actually secure large quantities in B.A. they got busy with direct connections of sorts while giving us the "stall," and now probably have some sort of commitment that suits them better. They are widely reputed up here for sharp practices, as you perhaps know, and they maintain a large legal staff to keep them out of jail."

I am turning the record over to L. B. Stanton tomorrow for an opinion—and fatherly advise. But see little prospect in any litigation. Will keep you informed of anything further that develops. Also am trying to place the glucose elsewhere.

Sincerely,

HAROLD A. WHIPPLE & CO.,  
/s/ HAROLD A. WHIPPLE.

(Testimony of Harold A. Whipple.)

Mr. E. B. Stanton: That is all with this witness, your Honor. Now, if you care to give an adjournment at this time——

The Court: Wait a minute. That is what I was going to talk to you about. You know, I never look at the clock. I was going to tell you about a matter and it may well be that you will want to go on and finish with this witness.

Gentlemen, this is the situation that has confronted me lately, that is, that I have had a very long succession of trials just following one after another, and in order to be able to do so I have had to keep very unorthodox hours, and in order to clear my calendar for this week I kept some very long hours to complete the case which preceded it.

The rush is over now and I have nothing further for the balance of the week because, as I told you, I promised you a clear date and I gave it to you when I took this case over. However, this situation has arisen: Because of the holidays, the usual meeting which we hold on the first Monday of every month was set for this afternoon at 3:00 o'clock. I mean the usual meeting of judges begins at [48] 3:00 o'clock. It is very important that I attend it for several reasons. An added reason is that, as I informed you, I am to sit in San Francisco next month and I have just received a letter from Judge Garrecht about the assignment which will probably make it impossible for me to attend the meeting next month, which means it will be the last month



(Testimony of Harold A. Whipple.)

before vacation when we can have a meeting of the judges, where we usually discuss various matters. Sometimes I take a chance and rely on the possibility of leaving early, but when I did that last month in order not to break the continuity of the case I was on, I kept counsel here waiting for an hour and a half before I returned.

So I was going to suggest this to you: In view of the fact that we do have ample time and I am willing to work long hours in order to complete the case, and I figure if you do not complete it, you have prepared and you can go on next week and I will trail the other cases, it may well be that instead of running a chance of not having more than an hour, you can go on now and complete with this witness and take an adjournment until tomorrow morning.

I am just leaving that up to you. You know best whether the case will take the entire week or not. You, yourselves, probably were affected the same way by the holidays. And we also have the fact that it is also a holiday so far as the State courts are concerned. Everything is closed except the Federal departments, because it is not a [49] holiday as far as we are concerned, being an election day.

So I thought I would make the statement to you. If you want to, I will go on until 1:00 o'clock or complete with this witness and take an adjournment until tomorrow morning. I am sure we can make up the lost time. If you want to take an adjourn-

(Testimony of Harold A. Whipple.)

ment and go over until 2:00 o'clock this afternoon, I can do it, too. I will just leave it with you.

Mr. Bronson: It would be our turn to go ahead now with the examination of Mr. Whipple.

The Court: Yes.

Mr. Bronson: And I was going to suggest to your Honor that I think we can make more time if we have a little time now to go over his testimony, get our exhibits in shape and come back, than if we proceed now. In view of that I would like to make either one of two suggestions, alternative, to your Honor for the approval of counsel: That we either come back at 2:00 o'clock or adjourn until tomorrow morning. But I do think that I would like personally, and it would be an advantage to the court, in our having the time now to go over this testimony and get our exhibits in shape for the cross-examination of this witness.

The Court: What do you gentlemen say?

Mr. E. B. Stanton: I think, your Honor, we would prefer, if possible, to come back at 2:00 and run until 3:00 o'clock [50] if it is agreeable to the court.

The Court: If that is preferable, all right, if you want to do that.

Mr. Bronson: I was going to suggest, if your Honor has the balance of the week clear, I am confident we can complete the case this week.

Mr. E. B. Stanton: I feel that we will.

Mr. Bronson: Even if we adjourned until tomorrow morning at this time.

(Testimony of Harold A. Whipple.)

(Counsel conferring privately.)

The Court: Gentlemen, so long as you gentlemen cannot agree on it, we will make it 2:00 o'clock. By that time I will inquire of Judge McCormick to see what matters are up so as to see if my presence for any length of time is necessary. We will have that hour, anyway, and can complete with this witness. I have read these exhibits as we were going along. They are not very lengthy.

All right, gentlemen, 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 o'clock of the same day, Tuesday, June 1st, 1948.) [51]

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Tuesday, June 1st, 1948, 2:00 p.m.

Mr. Bronson: Will you resume the stand, please?

HAROLD A. WHIPPLE

(Recalled)

Cross-Examination

By Mr. Bronson:

Q. Mr. Whipple, with reference to the second exhibit that was placed in evidence, a letter from Mr. Baglin to you on May 20th, 1946, you sent a wire upon receipt of that letter to Engraw, did you not?

A. Would you read the letter or let me read the letter?

(Testimony of Harold A. Whipple.)

Q. Yes, I have a copy here, handed to me by your counsel.

Would you produce, Mr. Stanton, a wire—cable, rather, sent by Mr. Whipple to Engraw on May 20th? A. Yes; I sent a letter to Engraw.

Q. Was it sent the same date as that letter shows?

A. I would like to see the wire that Mr. Stanton is looking for.

Mr. E. B. Stanton: I do not have an original of the wire—oh, it is Whipple to Engraw. Excuse me.

Q. (By Mr. Bronson): While we are waiting for that and if it is not an interference with the counsel's search, when did you get that letter that you have there now that [52] is marked Exhibit 2 here? A. This letter of May 20th?

Q. Yes.

A. I have no way of telling, Mr. Bronson, but I believe on the 21st.

Mr. Bronson: For the assistance of counsel, it is a wire that starts "Confirming Sale 1,300 Tons Glucose."

Mr. E. B. Stanton: I have this.

Q. (By Mr. Bronson): Your counsel has handed me a copy of a telegram addressed to "Engraw" and signed "Whipl." Was that cable sent by you to Engraw? A. That is correct.

Q. And the date that the copy bears in the upper right-hand corner "May 20 2 42 PM" is ap-

(Testimony of Harold A. Whipple.)

proximately the day and hour that it was sent, is that true?

A. I assume that is the date which it was received, Mr. Bronson, because this is a copy on the All America, which would be a copy taken in Buenos Aires.

Mr. Bronson: Have you the original of that cable, Mr. Stanton? You supplied us with a photostatic copy of it and it shows it was sent on the 20th. Do you have the original?

Mr. E. B. Stanton: I haven't got the original.

The Witness: That would be quite probable.

Mr. Bronson: Will it be stipulated that the telegram [53] was sent on the 20th? That is the cipher for it there on all cables, I am sure you are familiar, and your copy shows.

Mr. E. B. Stanton: This bears the 20th. That means it was sent on the 20th.

Mr. Bronson: Your copy here shows Los Angeles date May 20th, isn't that right?

Mr. E. B. Stanton: That is what it shows.

Mr. Bronson: Can we stipulate that the cable was sent on the 20th of May as your stamped copy shows?

The Witness: That would be correct.

Mr. Bronson: We will offer that into evidence, if your Honor please, in lieu of the original, a copy supplied by counsel.

The Court: All right.

The Clerk: It will be Defendant's Exhibit A in evidence.

(Testimony of Harold A. Whipple.)

DEFENDANT'S EXHIBIT A

All America Cables and Radio, Inc.

May 20 2 42 PM

ESA.

BSXZ29 Los Angeles Calif 28 20 9.58 NG

Engraw Buenos Aires

Confirming sale 1300 tons glucose accordance offer  
April April 24 May 9 cable earliest shipping San  
Francisco whose name credit can you increase ear-  
lier shipments

WHIPL

---

Q. (By Mr. Bronson): Talking of that exhibit  
for a minute, Mr. Whipple, the wire reads:

“Confirming sale 1300 tons glucose accordance  
offer April April 24 May 9 cable earliest shipping  
San Francisco whose name credit can you increase  
earlier shipments

Whipl”

The sale that you confirm by this cablegram was  
to whom? [54]

A. That would be confirming the sale to Schen-  
ley on Mr. Baglin's verbal commitment.

Q. When did you receive the verbal commitment  
from Mr. Baglin?

A. At sometime during the day of May the 20th.

Q. And did you ask him to write a letter?

A. I did.



(Testimony of Harold A. Whipple.)

Q. In line with what he had said on the phone?

A. I did.

Q. I will bring this up here if you require it, but I am calling your attention to what the letter shows: "We are interested in purchasing up to a thousand tons." Then it specifies shipping dates and speaks of another 300 tons as follows: "Further, if your prospective buyer does not take the 300 tons, we would like the opportunity to purchase this quantity in addition to the thousand tons."

A. Which would make a total of 1,300 tons.

Q. Yes. But what Mr. Baglin told you on the phone, Mr. Whipple, was that he was interested in purchasing glucose, is that not true?

A. What Mr. Baglin told me on the phone is not necessarily stated in his letter.

Q. What he said in the letter was that he was interested, and wasn't that what you asked him to reproduce of the conversation? [55]

A. No. My recollection of the conversation was that I asked him to make it in the form of a firm offer to purchase.

Q. And you got a statement that he was interested in buying glucose to that amount?

A. That is correct.

Q. Now, further with respect to the letter you got from Mr. Baglin, he stated there: "Just as soon as you receive a reply to your cable to the shipper, which we understand will be by Wednesday of this

(Testimony of Harold A. Whipple.)

week, you will phone this office and advise us that the shipping schedule reflected by that can be made. We will be expecting information from you which will enable us to issue purchase order and covering letter of credit." You recall that in Mr. Baglin's letter?

A. I do.

Q. Did you supply him with a shipping schedule thereafter?

A. Yes, sir.

Q. On what document was that?

A. I supplied him by telephone and it was confirmed by letter, by letter to him of May the 21st, I believe, which is in evidence.

Q. At the date that you sent the cable that is our first exhibit confirming sale of 1,300 tons, you had no sale at that time; that is true, isn't it, Mr. Whipple? [56]

A. I had a commitment to purchase.

Q. You had a statement that they were interested in Glucose and that is all, is it not?

A. I did not have the written letter in my hand at that time, Mr. Bronson. I only had Mr. Baglin's statement on the telephone.

Mr. Bronson: May I have wire from Engraw to Mr. Whipple dated May 21st? Any objection to it going into evidence? And your reply——

Mr. E. B. Stanton: I said no.

Mr. Bronson: I beg pardon.

Mr. E. B. Stanton: I said no.

Mr. Bronson: I am sorry, I did not catch your answer.

(Testimony of Harold A. Whipple.)

We will offer this wire that counsel just agreed may go in and I will read it to the court.

The Clerk: Defendant's Exhibit B in evidence.

The Court: You do not need to read these. I can read them.

Mr. Bronson: Very well, your Honor.

The Court: Under my custom they are transcribed, anyway.

Mr. Bronson: Very well.

---

#### DEFENDANT'S EXHIBIT B

is in the following words and figures, to wit:

"CDU234 Intl-CD Baires via Allamerica 40/37  
21 1202P

"LC Whipl ([57]

"Losa

"Subject prior sale sixhundred tons available price onethirty require twentyfivepercent downpayment balance confirmed credit our order delivery hundredfifty tons monthly starting July answer today will endeavor secure balance if you confirm new price.

ENGRAW."

---

Mr. Bronson: I have another cable I would like you to produce if you will.

I have a cable here handed me by your counsel,

(Testimony of Harold A. Whipple.)

a night letter, dated the 21st and showing its receipt in Buenos Aires on the day following, May 22nd, directed to Engraw and signed "Whipple." Did you send such a cable on that day?

A. That is correct. May I see that again, Mr. Bronson?

Mr. Bronson: Yes, indeed. I will ask that that be admitted and marked, your Honor.

The Court: It will be received.

The Clerk: Defendant's Exhibit C in evidence.

---

### DEFENDANT'S EXHIBIT C

is in the following words and figures, to wit:

"WL H223 Hollywood Calif 38 21

NLT Engraw Baires

Accept 600 tons one thirty shipments one hundred fifty monthly will accept balance as available same price Schenley Distillers will open credit entire amount but no cash deposit try ship during June cable confirmation.

WHIPL."

---

Mr. Bronson: Have you the original of that?

Mr. Bronson: Have you any objection to this wire, signed by Engraw and dated May 23rd, received May 23rd and directed to Mr. Whipple?

Mr. E. B. Stanton: No.

(Testimony of Harold A. Whipple.)

Mr. Bronson: We will ask that the wire, starting "Urgent. Arrange Immediately Credit," be admitted as our next exhibit.

The Clerk: Is this admitted, your Honor?

The Court: Yes.

The Clerk: Defendant's Exhibit D in evidence.

---

### DEFENDANT'S EXHIBIT D

Western Union Telegram

CDV3 Intl-CD Baires Via Allamerica 32/30 23  
1025 A

Harold A. Whipple Co.

316 Commercial St Rm 208

Losa

Urgent arrange immediately credit our order to cover sixhundredtons stop Ask American Bank cable First Boston here so can meet requirement one supply source market today up fivecents.

ENGRAW.

---

Mr. Bronson: Will there be objection to the wire signed "Engraw," dated the 23rd of May, night letter?

Mr. L. B. Stanton: No.

Mr. Bronson: ———received May 24th. I will ask that the wire from Engraw to Whipple, starting with "Eleven Hundred Thirty-five Tons Total

(Testimony of Harold A. Whipple.)

Available at one Thirty. Stop." be admitted as our next exhibit. What is the number of that?

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Defendant's Exhibit E. In evidence.

---

DEFENDANT'S EXHIBIT E

Western Union Telegram

NB91 Intl-CD Baires Via Allamerica 45/43 23

NLT Whipl

Harold A. Whipple Co.

316 Commercial St. Rm 208

1946 May 24 AM 1 59

Elevenhundredthirtyfive tons total available at onethirty stop Now signing contracts stop Must have confirmed credit ourtel today by Saturday otherwise sixhundred contract voided stop Also advise credit for balance immediately stop Additional fourhundredtons available subject prior sale at one-thirtyfive.

ENGRAW.

---

Q. (By Mr. Bronson): Mr. Whipple, I have a photostat of a letter written by you to Engraw, a letter dated May 23rd. Do you have that or is it in the hands of counsel?

A. It would be in the hands of counsel.



(Testimony of Harold A. Whipple.)

Mr. Bronson: I ask you to produce that, please?

Mr. E. B. Stanton: We stipulate that you can use this photostatic copy, in lieu of the original. We actually don't have it here.

Mr. Bronson: Do you have a copy?

Mr. E. B. Stanton: I have a copy.

Mr. Bronson: I only have one.

Mr. E. B. Stanton: I just have one copy here. It is the same thing.

Mr. Bronson: Do you have any objection to my using the white copy?

Mr. L. B. Stanton: Well, I think that is a copy of the other. This is a copy of a copy.

Mr. E. B. Stanton: That is a copy of a copy. All I ever had was a carbon copy.

Mr. Bronson: This was taken from the original.

Mr. E. B. Stanton: I believe this is a copy.

Mr. Bronson: All right.

Mr. E. B. Stanton: We will stipulate that there was an original letter so sent.

Q. (By Mr. Bronson): I will hand you a document just mentioned, Mr. Whipple, and ask you to identify it, if you will?

(Witness examines said document.)

Can you identify it?

A. Yes, that is a letter which I wrote. [61]

Mr. Bronson: I ask that this photostat be admitted as defendant's exhibit next in order.

The Clerk: Is it admitted, your Honor?

The Court: It may be received.

The Clerk: Defendant's Exhibit F in evidence.

(Testimony of Harold A. Whipple.)

DEFENDANT'S EXHIBIT F

May 23, 1946

Cia Engraw  
San Martin 329  
Buenos Aires  
Argentina

Dear Mr. Berger:

referring to our enclosed cable confirmations on the subject of Glucose these answered yours as follows:

May 21

Subject prior sale sixhundred tons available price one thiry require twentyfive percent downpayment balance confirmed credit our order delivery one hundred fifty tons monthly starting July answer today will endeavor secure balance if you confirm new price."

May 22 NLT

Acting on your cable twentyfirst have completed firm purchases for account Shenley Distillers eleven hundred thirty five tons stop your use night letter lost July August deliveries offered are working on this stop have closed June delivery fifty tons July sixty August sept two hundred sept one hundred fifty october two seventyfive november two hundred December two hundred stop as contract is in argentine pesos assume purchaser is covering forward exchange more details tomorrow.

ENGRAW.

my 23 LC

(Testimony of Harold A. Whipple.)

urgent arrange immediately credit our order to cover sixhundred tons stop ask American bank cable first Boston here so can meet requirement one supply source market up today five cents.

ENGRAW.

We therefore confirm the sale of 1135 tons (metric) of glucose 43-45 baume, crystal clear, derived from incomplete hydrolysis cornstarch with a Balling of 81.8 upwards. "We have in our possession a confirming letter from Schenley authorizing us to secure up to 1300 tons for them in accordance with your earlier offer. And we have their verbal commitment and assurance that confirming letter is in the mail tonight covering the actual confirmation of the above.

They state that the actual letter of credit and purchase order will be cleared directly to you from their Louisville and New York offices via airmail (we will ask them to cable credit) just as soon as it can be issued.

We have sold this glucose to them at Pesos 1.375 per kg FOB Buenos Aires to include our overage of .075 pesos per kg. which we have asked you to confirm tonight with the understanding that payment will be remitted from the collecting bank here. We hope that you will be able to improve the shipping schedule for June July as they re most anxious to get larger deliveries as soon as possible.

H. W. CO.

(Testimony of Harold A. Whipple.)

Mr. E. B. Stanton: Mr. Bronson, I have found this.

Mr. Bronson: May I substitute a copy of it, please, if you don't object? It is a little more legible, I think.

Mr. E. B. Stanton: That is the one which was photostatted, with the initials on it.

Mr. Bronson: I am sorry.

Q. I show you a cable dated May 23rd, a night letter directed to Engraw, by Whipple, and showing received stamp in Buenos Aires on the 24th. Did you send such a cable?

A. That is right.

Mr. Bronson: I will ask that that be admitted and marked as the next exhibit for the defendant. It starts with "Schenley Credit Includes Our Overage"—

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Defendant's Exhibit G, in evidence.

---

### DEFENDANT'S EXHIBIT G

The Western Telegraph Company Limited

No. 00256

Telegrama

WLH231 Losangeles Calif 26 23

NLT Engraw Baires

Schenley credit includes our overage you instruct

(Testimony of Harold A. Whipple.)

collecting bank remit us from proceeds please cable confirmation this arrangement what results trucks

WHIPPLE.

---

Q. (By Mr. Bronson): Another document, cable of May 23rd directed to Engraw by Whipple and showing it received on the same day in Buenos Aires, according to the stamp thereon. Did you sign that wire? [62]

A. That is right.

Q. Whose writing is on the foot of that?

A. I have no idea.

Q. It isn't yours?

A. Obviously not, since that is from Buenos Aires.

Mr. Bronson: I will ask that this be admitted and marked the next exhibit number.

The Clerk: Is this admitted in evidence, your Honor?

The Court: It will be received.

The Clerk: Defendant's Exhibit H, in evidence.

---

### DEFENDANT'S EXHIBIT H

The Western Telegraph Company Limited

Telegrama

No. 00930

LH67 Losangeles Calif 23 23 1020A

Engraw Baires

Schenley issuing purchase order credit you

(Testimony of Harold A. Whipple.)

favor directly from New York 1135 tons soonest possible try improve June July shipments.

WHIPL.

---

Mr. Bronson: You have no objection to the use of this as a cable from Engraw to Whipple, dated May 24th?

Mr. L. B. Stanton: No, sir.

Mr. Bronson: I will ask that the telegram from Engraw to Whipple, dated May 24th, beginning "Re Telegrams Twenty Third, Will Arrange Yours as Requested," and ask that that be admitted as another exhibit.

The Clerk: Is this admitted in evidence?

The Court: It may be received.

The Clerk: Defendant's Exhibit I, in evidence.

---

## DEFENDANT'S EXHIBIT I

Western Union Telegram

1945 May 24 PM 2 26

CDV 169 Intl-CD Baires Vie Allamerica 41 24

NLT Whipl

Losa

(Harold A. Whipple Co.)

(316 Commercial St.)

(Room 208)

Retels twentythird will arrange yours as requested stop No delivery change possible present purchases stop Total sixhundred additional avail-



(Testimony of Harold A. Whipple.)

able onethirtyfive subject prior sale onehundred  
July onehundred August twowundred September  
twohundred October advise maximum possible time  
extension trucks.

ENGRAW.

---

Mr. Bronson: We offer, that is, with your stipulation that it may be offered, the wire signed by Engraw, directed to Whipple, dated May 27th, starting with "Awaiting Opening Credit Today" and I will ask that that be admitted as an exhibit. [63]

The Clerk: Is this admitted in evidence, your Honor?

The Court: Yes, it may be received.

The Clerk: As Defendant's Exhibit J, in evidence.

---

## DEFENDANT'S EXHIBIT J

Western Union Telegram

1946 May 27 PM 3 29

NB731 Intl-CD Baires 11 27 607P Via All America

LC Whipl

Losa

(Harold A. Whipple Co.,

316 Commercial St.

Room 208)

Awaiting Opening Credit Today Rush Telegram  
Bostonbank.

ENGRAW.

(Testimony of Harold A. Whipple.)

Q. (By Mr. Bronson): I will ask you to identify this next wire. It is directed to you from Engraw and dated May 27th. Did you receive that wire?

A. Yes.

Q. With regard to this wire, the first few words of it, they do not pertain to the glucose deal?

A. No.

Q. So that the expression "Expect trucks decision two weeks" may be disregarded for the purpose of this?

A. That is right.

Q. And the balance of it, of the subject has to do with the glucose transaction, does it not?

A. That is correct.

Mr. Bronson: I will ask that that be admitted in evidence as the next exhibit for the defendant.

The Clerk: Is this in evidence? Will this be admitted in evidence, your Honor?

The Court: It may be admitted.

The Clerk: Defendant's Exhibit K in evidence.

---

## DEFENDANT'S EXHIBIT K

Western Union Telegram

1946 May 27 PM 11 08

NB 1089 Intl-CD Baires Via Allamerica 32/30 27

NTL Whipl

Losa

(Harold A. Whipple Co.

316 Commercial St.

Rm 208)

Expect Trucks decision twoweeks stop Firm price

(Testimony of Harold A. Whipple.)

glucose impossible maintaining offer subject prior sale stop Extension obtained until twentyeighth exclusive limit must have credit eleventhirtyfive tons.

ENGRAW ENGRAW.

---

Mr. Bronson: Will there be any objection to this?

Mr. E. B. Stanton: No objection.

Mr. Bronson: We now offer in evidence, there being no [64] objection from counsel, a telegram directed to Whipple by Engraw, dated May 28th. I want to change that. It is from Whipple to Engraw on May 28th, and it shows the stamp of receipt in Buenos Aires on the same day.

The Clerk: Is this admitted, your Honor? Is this exhibit admitted, your Honor?

The Court: It may be received.

The Clerk: That is Defendant's Exhibit L, in evidence.

---

#### DEFENDANT'S EXHIBIT L

The Western Telegraph Company Limited

No. 00709

Telegrama

LH58 Losangeles Calif 14 28 1013A

Engraw Baires

Credit 1135 issued Newyork through chase or bankers cabling number later.

WHIPL.

(Testimony of Harold A. Whipple.)

Mr. Bronson: I might say, your Honor, just so the record may make some sense here, that without comment I am offering copies of certain of these cables and letters to the counsel for the plaintiff, so that he can secure the originals from his files. I have been doing that right along for the last several. Will there be objection to this being offered in evidence (indicating document)?

Mr. L. B. Stanton: No objection.

Mr. Bronson: A wire of May——

Mr. L. B. Stanton: I believe these are all immaterial, but we have no objection, if you wish them in, Mr. Bronson.

Mr. Bronson: Yes, we want them in. We offer now a wire——

Mr. L. B. Stanton: What is the date on this?

Mr. Bronson: The date shows it was started on May 29th and received on May 30th. It was directed by Engraw to Whipple and I will ask that that wire just described be [65] admitted in evidence as the next exhibit for the defendant.

The Court: It will be admitted.

The Clerk: Defendant's Exhibit M, in evidence.

(Testimony of Harold A. Whipple.)

DEFENDANT'S EXHIBIT M

Western Union Telegram

1946 May 30 AM 6 05

CDU23 Intl-CD Baires Via Allamerica 20/19

May 29

NLT Whipl

Losa

(Harold A. Whipple Co.

316 Commerical St. Em 208)

Without notice creditnumber urge cable Boston  
bank could obtain extension withour guaranty stop  
Please wire.

ENGRAW.

---

Mr. Bronson: I now offer, if there be no objection, a wire of May 31st directed by Whipple to Engraw, and ask that it be admitted to evidence as the next exhibit.

Mr. L. B. Stanton: I suggest that you show it to the witness.

Mr. Bronson: I beg your pardon?

Mr. L. B. Stanton: I would suggest that you show it to the witness.

Mr. Bronson: Yes. Do you want it shown to the witness?

Mr. L. B. Stanton: Yes.

(Mr. Bronson hands said document to the witness.)

(Testimony of Harold A. Whipple.)

The Witness: I would like to see the one of the previous day, that you just introduced, since this is in reply to it.

Q. (By Mr. Bronson): Can you supply that last exhibit (addressing clerk)?

That is Exhibit No. M.

(Mr. Bronson shows said exhibit to the witness.)

The Witness: All right.

Mr. Bronson: Just a moment, if your Honor please.

The Clerk: Is this admitted, your Honor?

The Court: Yes. [66]

The Clerk: That is Defendant's Exhibit N, in evidence.

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DEFENDANT'S EXHIBIT N

The Western Telegraph Company Limited

No. 00643

Telegrama

DLH87 Losangeles Calif 15 31 1007A

LC Engraw Baires

Reurtel twentyninth cable whether credit received Sanfrancisco promised Newyork clearing twenty-eighth.

WHIPL.

---

Q. (By Mr. Bronson): I show you a wire here that is dated June 1st—rather, it is dated May 31st,



(Testimony of Harold A. Whipple.)

and a night letter directed to you by Mr. Berger. Did you get that wire about June 1st?

A. I would have to look at the calendar as to the date, Mr. Bronson, because there was a week end at that time.

Q. Well, have you a recollection regardless of the date of having received such a wire?

A. Oh, certainly.

Mr. Bronson: All right. I ask that that be admitted and marked with exhibit number next in order for the defendant.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Defendant's Exhibit O in evidence.

## DEFENDANT'S EXHIBIT O

Western Union

NB 127 Intl-CD Baires Via Allamerica 23 31 NFT  
NLT Whipl

(Harold A. Whipple Co.)

316 Commercial St. Rm 208

Losa

1946 Jun 1 AM 3

49

No information regarding credit have Sanfrancisco pressure Newyork also advise definitely what Newyorkbank if chase Ican pressure direct.

ENGRAW BERGER.

Whipl Ican.

(Testimony of Harold A. Whipple.)

Q. (By Mr. Bronson): Here is a wire, Mr. Whipple, signed by the name Whipple and directed to Engraw, carrying date June 5th and showing June 6th receipt in Buenos Aires; did you send such a wire?      A. That is right.

Mr. Bronson: I will ask that this be admitted and marked next in order.

The Clerk: Is this admitted, your Honor?

The Court: Yes. [67]

The Court: Yes.

The Clerk: That is Defendant's Exhibit P in evidence.

---

### DEFENDANT'S EXHIBIT P

The Western Telegraph Company Limited  
WLH203 Losangeles Calif 42 5  
NLT Engraw Baires

Obtained return of portion of original sample today forwarded to Schenley laboratory Chicago demanded they furnish us specifications why require for acceptance suggested analysis certificate each shipment by superintendence company or other quoted analysis contained your cable today.

WHIPL.

---

Mr. E. B. Stanton: We put this one in.

Mr. Bronson: What?

Mr. E. B. Stanton: This is one we put in evidence.

(Testimony of Harold A. Whipple.)

Mr. Bronson: What exhibit would that be, counsel, Exhibit 14, the last one?

Mr. E. B. Stanton: Yes, that would be 14.

Q. (By Mr. Bronson): Now, as I understand it, Mr. Whipple, when you sent this telegram to Buenos Aires on May 20th, reading, "Confirming Sale of 1300 Tons of Glucose Accordance Offer April 24 May 9. Cable Earliest Shipping San Francisco whose name credit. Can You Increase Earlier Shipments."

You contended you had a sale at that time to Schenley of 1300 tons, is that your statement?

A. That is correct. [68]

Q. Is it also true that when you sent——

The Clerk: Your Honor, there seems to be a diversity of opinion here as to whether these telegrams and exhibits are to be copied into the record.

The Court: Well, if I did not say that they are to be copied into any record to be prepared——

The Clerk: The question is whether they go into the reporters' transcript as they are preparing it now.

The Court: That is up to counsel. They are ordering a daily transcript. That is up to them.

Mr. Bronson: I think they should be copied into the record, your Honor.

The Court: That is all right with me. As you gentlemen know, I never request a transcript and I have no funds with which to pay for one unless you complimentarily give me a copy. I follow the

(Testimony of Harold A. Whipple.)

testimony and I do not ask for it. I just completed a long anti-trust case without a transcript.

Mr. Bronson: I wonder if I could have a word with these gentlemen.

The Court: And I do not ask for a transcript.

Mr. Bronson: I thought I had understood your Honor's reporters this morning correctly. They are preparing a copy for you.

The Court: If they prepare one for my use it is all right. [69]

Mr. Bronson: I think it will simplify your Honor's work in going through the transcript to have the exhibits set forth.

The Court: That is all right.

Mr. Bronson: They can be capitalized so it shows, leaving out the unessentials such as headings and fine type and print.

The Court: All right; go ahead.

Q. (By Mr. Bronson): Mr. Whipple, when you sent the telegram, Exhibit B, on May 21st to Buenos Aires:

"Accept 600 Tons One Thirty Shipments One Hundred Fifty Monthly Will Accept Balance as Available Same Price Schenley Distillers Will Open Credit Entire Amount but No Cash Deposit Try Ship During June Cable Confirmation"

was it your contention at that time that you had made a sale to Schenley of any glucose?

A. That is covered by Mr. Baglin's letter of the 20th.

(Testimony of Harold A. Whipple.)

Q. Is that the one I showed you, Exhibit 2, in which he said, "We are interested in purchasing up to a thousand tons"?

A. No, sir. No, sir; there is a letter following that. I beg your pardon. Not Mr. Baglin's; Mr. Donnelly's letter of the 23rd.

Q. The wire that I have just called your attention [70] to you have seen.

The Court: You are reading No. C?

Mr. Bronson: No. C, yes, sir.

The Court: All right. I just wanted to know what the examination relates to.

Q. (By Mr. Bronson): Mr. Whipple, I am calling your attention to a wire which you sent on the 21st of May which I just read to you.

A. Yes.

Q. Is it your contention that at the time that you sold that and that you sent that wire, that you had sold any glucose whatever to Schenley?

Mr. L. B. Stanton: I will object to that as calling for a conclusion of the witness. The wire speaks for itself.

Mr. Bronson: The contents of the wire speaks for itself, true.

Mr. L. B. Stanton: But what his intention was or his thoughts were is one thing.

Mr. Bronson: Will you answer the question?

The Court: I think it is answered. It goes into a matter of opinion, Mr. Bronson. I will sustain the objection.

(Testimony of Harold A. Whipple.)

Q. (By Mr. Bronson): You testified this morning with regard to a conversation that you had with Mr. Woolsey about June 5th or 6th in which he notified you of the position that [71] the company took with regard to the transaction, testifying this morning that he stated to you that the company did not intend to fulfill its contract. Do you recall that testimony you gave this morning?

A. Yes, sir.

Q. When you sent the wire to your principals to South America, you stated the reasons that he had given you on the phone, did you not?

A. Would you read the wire, please?

Q. Yes; I will read it. I will read it to you.

“Schenley legal department San Francisco phones advise Cincinnati refuses complete contract claiming no contract because formal purchase order and credit not issued stop Effectively repudiates signature their San Francisco employee stop We requested responsible official put cancellation in writing stating reasons doubtful they will comply.”

A. That is correct.

Q. Isn't it true what Mr. Woolsey of the Legal Department told you was that there was no contract; that that was the position of the company that there was no contract because there was no purchase order or credit issued as yet?

A. He informed me that was the position of the company.



(Testimony of Harold A. Whipple.)

Q. In other words, you want to be understood that [72] way, rather than the statement that you said this morning that they did not intend to fulfill a contract; he did not use those words to you, did he, Mr. Whipple?

A. No, sir; I don't think he did.

Q. You also stated this morning that Mr. Woolsey told you in this conversation that Donnelly was not a responsible officer. As a matter of fact no such statement was made by Mr. Woolsey, was it?

A. Yes, sir; I believe it was.

Q. Calling your attention to the fact that such statement is not included in the wire that you sent to South America, is there any reason for your leaving out that particular thing that you say Mr. Woolsey said as a reason?

A. There would be no reason for me——

Mr. E. B. Stanton: One moment, Mr. Whipple. I think the wire does speak for itself in that regard.

The Court: Which wire are you talking of, the same one or another one?

The Witness: Yes, sir.

The Court: Are you still talking about C or a different one?

Mr. Bronson: This is Plaintiff's 14 of this morning, the last exhibit they put in this morning.

Mr. E. B. Stanton: It does not say "Respectfully Repudiates Signature". [73]

Mr. Bronson: No, "Effectively Repudiates Signature".

(Testimony of Harold A. Whipple.)

Mr. E. B. Stanton: A play on different words.

The Court: All right, go ahead.

Q. (By Mr. Bronson): Did you say that it is your recollection Mr. Woolsey made such statement?

A. Yes, sir.

Q. With regard to Mr. Donnelly's authority?

A. Yes, sir.

Q. And your counsel has called attention to the language "Effectively Repudiates Signature".

A. Yes, sir.

Q. And read that as your comment on what you considered that Mr. Woolsey's statement amounted to. Is that a correct interpretation of it, where you said "Effectively Repudiates Signature Their San Francisco Employee"?

Mr. L. B. Stanton: I have an objection to the examination along that line. The wire speaks for itself.

The Court: Well, no, I don't know. The witness has given the oral conversation which is a direct statement or a direct quotation to the effect that the person did not have any authority, while here the language does not on its face bear that interpretation because, to say "effectively repudiates signature" is merely the result of it but does not give the reason. "Effectively repudiates signature their San Francisco employee stop We requested responsible [74] official put cancellation in writing stating reasons doubtful they will comply." Now, you see, that second paragraph certainly

(Testimony of Harold A. Whipple.)

contradicts the idea that the statement which precedes it meant to imply that Mr. Woolsey had given the reason, because he is asking for the reason at the present time.

Overruled. Go ahead. Have you answered?

Mr. Bronson: Would you like me to repeat the question?

The Witness: Please repeat the question.

Q. (By Mr. Bronson): Reading a portion of this just preliminary to the question, you said: "Schenley Legal Department San Francisco phones advise Cincinnati refuses complete contract claiming no contract because formal purchase order and credit not issued stop Effectively repudiates signature their San Francisco employee stop." My question was: I interpreted that last expression "effectively repudiates signature" as your comment and your effect or your idea of the effect of what Mr. Woolsey had told you. Am I correct in that?

A. You are asking, Mr. Bronson, for an interpretation of a wording which is two years old.

Q. Yes. I am going to give you this. You stated up to the word "stop" what Mr. Woolsey said he was claiming, and then you started in something else, did you not, mainly to indicate an interpretation you put upon Mr. Woolsey's [75] statement?

A. That is correct.

Q. Actually, Mr. Woolsey told you that it was Schenley's position that there was no contract at all, words indicating that effect—true?

(Testimony of Harold A. Whipple.)

A. Yes.

Q. And he told you that the parties to the contract or the proposed contract had never agreed upon specifications; isn't that true?

A. No, sir.

Q. He did not say that?

A. Not to my recollection.

Q. Do you recall that he said anything about the fact that samples had not been approved?

A. No, sir.

Q. Did he tell you that Schenley had never issued any purchase order and that they had never put up the letter of credit and that that was, in their opinion, the reason why there had as yet been no contract effected?

A. Something to that effect, which I differed with.

Q. As you got it, as you recall it?

The Court: All right.

Mr. Bronson: Just a moment, if your Honor please. We have this trouble with so many exhibits.

The Court: I will tell you what I will do. I will [76] declare a recess and I will go over and see how quickly I can be relieved from the conference.

Mr. L. B. Stanton: If it would be convenient to your Honor, we might as well have the rest of the afternoon.

The Court: No. Let us complete with this witness. I suggested that this morning but you did not agree, and so I will go over to the meeting and see

(Testimony of Harold A. Whipple.)

how quickly I can be excused, and then we can complete the examination of this witness and I can return later.

(Short intermission.) [77]

The Court: You may proceed with the cross-examination of this witness.

Mr. Bronson: Have you the defendant's exhibits there?

The Clerk: The Court has them.

Mr. Bronson: That is all right.

The Court: Yes, sir, I have them. I am through with them.

Mr. Bronson: I have copies of them, Judge.

The Court: No. That is all right. I am through with them.

(Defendant's exhibits handed to Mr. Bronson.)

Mr. Bronson: May I proceed, now, your Honor?

The Court: Yes.

Q. (By Mr. Bronson): First, with regard to the date upon which you first were spoken to by Mr. Donnelly, you stated it was around about the 20th—you stated it was around about the 14th, as I understand, of May? A. That is right.

Q. Looking at your deposition in which you gave a date, I am reading from page 8, "I believe May 20th, I believe May 19th or 20th, I may be wrong by two or three days?" A. Yes.

Q. That is the conversation, the first phone call you had from Mr. Donnelly?

(Testimony of Harold A. Whipple.)

A. Yes. I later substantiated that it was May 14th. [78]

Q. You have substantiated that since the deposition?

A. That is right.

Q. By reference to what, if I may ask?

A. By reference to the correspondence and by reference to the time elapsed necessary between the various things and by reference to the deposition of both Mr. Donnelly and Mr. Baglin.

Q. Well, what correspondence did you refer to that assisted you in correcting the date when you first had a conversation with Mr. Donnelly?

A. Well, I have re-read all of the telegrams and everything concerning this case since that time, Mr. Bronson. I say, as I specified at that time, I could not be sure within a matter of several days as to the date, at that time.

Q. All right. Now, will you take this letter here that you wrote to Schenley Distillers, attention Mr. Baglin, on May 21st, 1946 (It is marked Exhibit 3), you quote in opening portion of that letter two telegrams, without giving their dates. I will hand you now Defendant's Exhibit C and Defendant's Exhibit B, and ask you if those two exhibits of the defendant are the telegrams that you were quoting in your letter to Mr. Baglin on May 21st that is marked Plaintiff's Exhibit 3?

A. Both of these are quoted in here.

Q. Yes. [79]

A. Exhibit B, being the first one.



(Testimony of Harold A. Whipple.)

Q. Exhibit B is the first one that is quoted in your letter. A. That is right.

Q. Well, compare that. You left off a portion of that telegram, did you not, in sending it to Mr. Baglin?

A. "Subject to prior sale," that is correct.

Q. All right. So, when you said, "confirming our telephone conversation today regarding Argentine glucose we quote from cable received today from our principals in Buenos Aires as follows, "six hundred tons available," leaving off the expression "subject to prior sale," is that correct?

A. That is correct.

Q. Now, going further in that exhibit "3", you say: "price 1.375 (pesos per kilo)." You did not quote that, of course, did you?

A. I did not—I did not quote the telegram to Mr. Baglin exactly as I had received it from Engraw.

Q. Let us get this: You put it within quotation marks in your letter to Mr. Baglin, did you not? Just look at the letter and confirm that fact.

A. Yes, that is correct.

Q. And you changed it, quoting it to him, the expression "one thirty" in the letter to "1.375," correct? [80] A. That is correct.

Q. By what authority did you do that? Did the people that you refer to as your principals authorize you to do that? A. Yes.

Q. Where is your authority? Have you it in some written form? A. No, sir.

(Testimony of Harold A. Whipple.)

Q. What form did it come to you in?

A. It was generally understood. In fact, I had it verbally in discussions approximately a year previous, discussions in Los Angeles with Mr. Berger when we first started negotiations of any sort.

Q. That at any time you quoted their prices, quoted a cable, that you could distort it in that manner, Mr. Whipple?

A. I quoted from a cable. I did not quote Mr. Baglin or state to Mr. Baglin that I quoted the entire cable complete. I quoted from a cable.

Q. You felt that authorized you to change the price within it?

A. I certainly did.

Q. Now, take the other exhibit, if you will. You made the same distortion there in quoting the second cable that you set forth within quotation marks in the letter to Mr. Baglin with regard to price changed from one thirty as it appears [81] in the cable to as it is here one thirty-seven and one-half, correct?

A. That is correct. [82]

Q. Who was it told you that you had authority to do that?

A. Sir?

Q. Who was it in the Engraw organization that told you, that you said it happened a year before?

A. Mr. Berger is the only contact I have had with the Engraw organization.

Q. Did you ever have any discussion either by letter or cable with the Engraw Company about the quotation that you have made in this transaction subsequent to May 23rd?

A. Yes.

(Testimony of Harold A. Whipple.)

Q. You confirmed, in any event, the purported sale, if I may refer to it that way, of 600 tons at 1.30 rather than 1.375, did you not? A. No.

Q. Will you state, Mr. Whipple, when it was—I will withdraw that question for a moment. Let me ask you, did you ever confirm to Engraw any glucose, that is, prior to May 23, 1946, at a price of 1.375? A. On May the 23rd, yes.

Q. No; prior to that date? A. No.

Q. I will ask you this, Mr. Whipple: When you first sent forward to Engraw the letter of May 23rd signed by Mr. Donnelly?

A. I believe on June 6th. [83]

Q. Well, then, up until that time, so far as any information that you gave to them, they were ignorant of the terms of the letter itself, is that true?

A. No, sir.

Q. Now, explicitly, were they aware of the contents of the postscript in that letter?

A. What is the postscript in that letter?

Q. I will read it to you if you haven't it in mind.

“P. S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial S. A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; September—150; October—275; November—200; December—200. The conditions of acceptance of this quantity are the same as those outlined for the 600 tons. The offer

(Testimony of Harold A. Whipple.)

of 600 tons is considered superseded by the foregoing."

My question is this: They were ignorant of the conditions attached to that postscript——

A. No, sir.

Q. ——until June 6th of 1946, is that your testimony?

A. No, sir; I do not think so. I believe on my telegram of May the 23rd and my confirming letter of May the 23rd it was covered in sufficient detail.

Q. Well, all that you told them, in other words, about that subject is what you put in the telegrams that you have last mentioned?

A. I might refer to the record?

Q. Well, you may, surely. I will have to hand you the whole sheaf. You start at the bottom and go up. Have you found a telegram?

A. My letter of May the 23rd.

"We therefore confirm the sale of 1135 tons (metric) of"—and I quoted from Mr. Donnelly's letter the specifications—"43-45 baume, crystal clear, derived from incomplete hydrolysis of corn-starch with a Balling of 81.8 upwards." I had at that time their verbal commitment and the promise of their letter which refers to Mr. Donnelly's letter of the 23rd.

Q. When did you inform them for the first time of the language of the postscript in which Mr. Donnelly said that the action was conditioned upon all of the specifications that appear above in the letter,

(Testimony of Harold A. Whipple.)

specifically the letter of credit and a purchase order that was signed by your principals?

A. I furnished them with the letter on June the 6th.

Q. That is the first they had of that? [85]

A. The first copy they had of that contract.

Q. Have you any interest in the outcome of this suit, Mr. Whipple?

A. Yes, sir.

Q. A money interest?

A. Yes, sir.

Q. As a matter of fact you engaged counsel, did you not, for this concern here in Los Angeles?

A. No, sir.

Q. Well, didn't you go and see Mr. Stanton shortly after June 6th?

A. I certainly did, I believe on the date of June 6th.

Q. Well, I only suggest it was out of that contact that his representation of the plaintiff arose?

A. That is a question for Mr. Stanton to answer.

Mr. Bronson: All right. That is all, your Honor, at this time.

Mr. L. B. Stanton: I will say very frankly that it was not in any respect.

Mr. E. B. Stanton: Mr. Whipple, will you stay on the stand just a moment? I have a few questions on redirect.

### Redirect Examination

By Mr. E. B. Stanton:

Q. Mr. Whipple, I show you this telegram to

(Testimony of Harold A. Whipple.)

Engraw [86] signed by yourself, dated May 24th.  
Do you recognize that?           A. Yes; I do.

Q. You sent that wire to Engraw on the date shown?  
A. That is right.

Mr. E. B. Stanton: I ask that this be introduced as Plaintiff's next in order.

The Clerk: Is this admitted, your Honor?

The Court: Yes; it may be received.

The Clerk: That will be Plaintiff's Exhibit 16 in evidence.

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### PLAINTIFF'S EXHIBIT 16

The Western Telegraph Company Limited  
No. 00999

LH74 Los Angeles Calif 21 24 205P

Engraw Baires

Schenley processing credit 1135 tons but doubtful  
New York will clear before Monday will not stand  
further increase

WHIPL

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The Court: All right.

Mr. E. B. Stanton: I am waiting for counsel to read the letter.

Q. Mr. Whipple, this matter of the 1300 tons which you mention in one of the cables that is in evidence, had you received communication relative to 1300 tons at any time from Engraw?



(Testimony of Harold A. Whipple.)

A. Yes; I had.

Q. I show you this wire dated April 24th addressed to "Whipl" and signed "Engraw" and ask if you have seen that before?

A. Yes; I have.

Mr. E. B. Stanton: I will ask that this be introduced in evidence as plaintiff's next exhibit in order. [87]

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 17 in evidence.

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### PLAINTIFF'S EXHIBIT 17

Western Union Telegram

1946 Apr 24 AM 4 33

NB138 Intl Cd Baires via RCA 46/45 23

NLT

(Harold A. Whipple Co.)

(316 Commercial St., Room 308.)

Losa

Can obtain thirteenhundred tons glucose specification ourlet third delivery May fifty June thru September one hundred each October November twohundredseventyfive each December threehundred price net pesos Argentine onetwentyfive fob Baires including barrels and our commission cable answer immediately offer subject our confirmation

ENGRAW

(Testimony of Harold A. Whipple.)

Q. (By Mr. E. B. Stanton): That is where you got the idea of the 1300 tons originally?

A. That is correct.

Q. I show you a letter dated April 3rd on the stationery of Compania Engraw, addressed to "Harold A. Whipple," signed "Cia. Engraw Commercial E. Industrial Andres del Borgia" and ask you if you received that letter?

A. Yes; I did.

Q. Calling your attention, Mr. Whipple, to the third from the last paragraph and reading from the letter—fourth from the last paragraph:

"As you can see, our position—yours and ours—is that of only intermediaries and only as such can we reach to a conclusion.

"Our commission will be only 1%. Accordingly, we hope that you will be in a position to reserve for us from your commission an equitable part for it is only fair that if your consumer can obtain a lower price you can ask a higher commission. We shall await further word from you as to this matter."

Does that refresh your recollection to any degree regarding the arrangement that you had concerning this [88] difference between 1.30 and 1.375 which you quoted?

A. Yes. We had discussed in previous correspondence two or three alternative methods of handling this business, one which I had urged upon them was that I should act strictly as their representative and that any overage which was estab-

(Testimony of Harold A. Whipple.)

lished here could be participated in on a basis to be agreed upon between us. Another, that I should act as a buying agent for the domestic user, collecting a buying commission from the user here.

There had been no definite commitment at the time that this transaction was negotiated which of those methods would be used. The original understanding from this letter which you have just shown me was that they would quote for the account of the supplier down there. Subsequently their cable, cabled instructions, was that the letter of credit should be opened in their name. I therefore assumed that they had adopted and accepted the second method which I had suggested of working directly for them, rather than for someone else down there whom I did not know and was not in a position to judge whether I could trust or not.

Q. Did you ever receive confirmation of their acceptance of the second method in writing?

A. No.

Q. Mr. Whipple, I show you a letter here dated June the 3rd, 1946. Will you read this, please? It is on the [89] stationery of Engraw, signed "G. Fred Berger."

While the witness is reading that letter I would like to introduce this letter previously identified, dated April 3rd.

Mr. Bronson: What is the number of that exhibit?

The Clerk: Is it admitted, your Honor?

The Court: Yes.

(Testimony of Harold A. Whipple.)

The Clerk: That is Plaintiff's Exhibit 18 in evidence.

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PLAINTIFF'S EXHIBIT 18

Compania Engraw  
Commercial & Industrial S. A.  
Beunos Aires (Argentina)

April 3rd, DE 1946

Mr. Harold A. Whipple,  
H. A. Whipple & Co.,  
316 Commercial Street,  
Los Angeles 12, Calif.

Ref: Glucose

Dear Mr. Whipple:

Following the letter sent to you by Mr. Berger under date of March 20th regarding glucose, I have the pleasure to send you the further information regarding the market for this product.

I wish first to confirm your telegram of March 26th, reading as follows:

“Three and half yard dump truck steel body hydraulic lift heavy reinforcing original scout chassis 2000 dollars FOB Los Angeles relet 20th glucose wire best October price thousand barrel lots what monthly quantity available believe possible contract your full production.”

Thank you for the information regarding the dump truck. As soon as we have any information regarding same, we shall let you know.

(Testimony of Harold A. Whipple.)

Referring to the glucose, as we noted, there are only two manufacturers in this country. Their production is sold part to the local market and part is exported.

Regarding the export production, the factories are only interested to sell directly thru their representative here to the consumer of the glucose in the United States for they do not wish to deal with speculators.

We contacted immediately the two representatives of the two manufacturers of glucose and now we are in a position to inform you about the changes that have taken place during this period on account of the great demand for such product.

One of the representatives informed us that the market does not admit any definite agreement being the production of the factory already taken. We might obtain thru this representative, around 500 tons for shipment before October, possibly for June or July buying a part from the factory direct and a part from the speculators in the market here if we are allowed to buy up to Arg. Pesos \$1.20 per kilo, F.O.B. Buenos Aires.

The other representative of the most important of the two factories hopes to be in a position to offer thru his representative in New York to the consumer you will appoint who will open the letter of credit to his favor here in Buenos Aires.

This representative will call us before the end of this month to inform us if the factory is in a condition to ship the lot of 1000 barrels required by

(Testimony of Harold A. Whipple.)

you and also to inform us regarding the monthly quantity available in the future.

In the meantime, we secured the specification of the glucose and analysis of the product which they manufacture. There are two classes of glucose; liquid and solid.

From your letter of March 27th, which reached our desk on April 2nd, you ask us to send you a flask as a sample and we did so as of today, sending same by air express parcel being this sample of glucose liquid. When you reply to this letter, please inform us if you require solid or liquid glucose.

The specifications of the liquid glucose sent to you, are the following:

43/45° Baume—not more than .005 SO<sub>2</sub>

The barrels are made of American Gunwood and the net weight is 300 kilos and the gross weight 330 kilos.

We are advised that the factory will be in a position to make a very good offer notwithstanding that the market is actually at Arg. Pesos \$1.02 per kilo. Their offer would be less for they are not interesting in following the market price.

As you can see, our position—yours and ours—is that of only intermediaries and only as such can we reach a conclusion.

Our commission will be only 1%. Accordingly, we hope that you will be in a position to reserve for us from your commission an equitable part for it is only fair that if your consumer can obtain a lower



(Testimony of Harold A. Whipple.)

price you can ask a higher commission. We shall await further word from you as to this matter.

As to the monthly quantities available after October, we do not believe we shall be able to get the full production of the factory as they do not want to sell to only one consumer in consideration that they do not want to lose the actual customers they now have.

Regarding the letter of authorization requested by you to solicit orders for the factory, I wish to remind you that the representative of the factory here has his agent in New York. For this reason it will obviously be not possible to send you the letter of authorization. Instead, you will have to inform us each time the name of the purchaser and the quantity needed.

Cordially yours,

CIA. ENGRAW COMERCIAL  
E INDUSTRIAL S.A.

/s/ ANDRES DEL BORGIA,  
Import Manager.

ADB:MBF

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A. Mr. Stanton, in view of this letter I would like to change my previous testimony.

Q. (By Mr. E. B. Stanton): Has that letter refreshed your recollection in any regard?

A. This letter refreshes my recollection to the extent that they did in fact on June the 3rd confirm the arrangement as to our overage.

(Testimony of Harold A. Whipple.)

Q. Would you read the portion of the letter which calls that to your attention?

A. "I note your second last paragraph with regard to your overage and we have confirmed that we will take the steps necessary to see that you receive this. Just how this can be arranged, I am not certain and of course, we are awaiting the receipt of the letter of credit so that we can know its terms and will then discuss the matter with the First National Bank of Boston here in order to determine the [90] method whereby we can protect you for your coverage and take the steps necessary to see that you obtain it."

Q. When they speak of "overage" that means your commission, does it, as selling agent?

A. That is right.

Mr. E. B. Stanton: I will ask that this letter be introduced as Plaintiff's next in order.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 19 in evidence. [91]

(Testimony of Harold A. Whipple.)

PLAINTIFF'S EXHIBIT 19

Compania Engraw  
Commercial & Industrial S. A.

New address:

San Martin 329, P. 3.

Tel. 31-8311.

Buenos Aires, Argentina

June 3rd, DE 1946.

Mr. Harold A. Whipple,  
H. A. Whipple & Co.,  
316 Commercial Street,  
Los Angeles 12, Calif.

Dear Mr. Whipple:

Your airmail letter of May 23rd, reached our office while I was in Montevideo, so I am just now in a position to reply to it.

In the meantime, I have been following closely the inter-change of telegrams with regard to the completion of our contracts for 1535 tons of glucose and on Friday night, I cabled you asking you to have the San Francisco bank pressure New York for at least the cable number of the letter of credit and also the definite name of the New York Bank which is issuing the credit for if I have that information, I can do some personal pressuring from my end. As a former New York State bank examiner, I have ample contacts in any of the big New York banks, so direct cable will be of assistance in supplying the information we need for we have had to do a real job of salesmanship here in order to

(Testimony of Harold A. Whipple.)

avoid cancellation of contracts because we could not deliver at least the credit number and the name of the bank issuing the credit.

Naturally, as these contracts are in Argentine Pesos, I can understand that there may be some delay in processing the credit in New York, but there is no reason why we should be delayed in receiving at least the credit number which would serve to eliminate most of our troubles.

We note your request to step up the shipping schedule but for June, that will be impossible. It is only thru the best of luck that we were able to tie in any for June and in order to do that, we have had to purchase and pay the 50 tons for our own account, pending the receipt of the letter of credit.

The delivery schedule of the 1535 tons is as follows:

June .....	50 tons
July .....	160 "
August .....	100 "
Aug.-Sept. ....	200 "
September .....	250 "
October .....	375 "
November .....	200 "
December .....	200 "
<hr/>	
1535 tons	

I note your second last paragraph with regard to your overage and we have confirmed that we will take the steps necessary to see that you receive this.

(Testimony of Harold A. Whipple.)

Just how this can be arranged, I am not certain and of course, we are awaiting the receipt of the letter of credit so that we can know its terms and will then discuss the matter with the First National Bank of Boston here in order to determine the method whereby we can protect you for your coverage and take the steps necessary to see that you obtain it.

In this connection, I also note that you feel that it is possible for you to arrange a contract with Schenley for 1947. With this arrangement, we are, of course, entirely in accord and as soon as you give us definite information (which I hope will be at a very early date—before the speculators close with the sources we have available) we will take the steps necessary to provide for closing the contracts.

Then, I think we should also have an understanding as between yourselves and ourselves with regard to the commissions or overcharges involved. Actually, on this particular contract, for the balance of 1946, we have had to make our purchases F.A.S. and after paying the necessary charges, including custom brokers, etc. we will net about 0.5 centavos per kilo but with that, we also have the risk of having to pick up deliveries of glucose if the coordination and the arrival of a steamer should not coincide and this may well cut into our profit margin if we should have any bad luck from a steamer point of view.

(Testimony of Harold A. Whipple.)

I don't know what costs you have on your 71½ centavos per kilo but I believe that we should coordinate our efforts first, in order that there may be a proper division of the commissions or overages available and second, that we may know, in determining the price we can afford to pay, and also in determining the price at which the glucose should be offered.

We certainly want to be fair to you but we believe you also desire to be fair to us and if we are to arrange a program of this sort to carry on in the future, regardless of the price of glucose, it should be with a complete understanding of the manner in which your and our interests will be compensated.

Then too, there is another factor which disturbs me somewhat for I am sure you realize the danger on basing this program entirely on only one customer. In an earlier letter, you mentioned your interest in establishing yourselves as sellers of glucose in many areas of the United States and if we are both "on the job", you can develop the market and we the sources and establish a continuing business with profit to both of us. But I cannot help but feel that your interest and ours, would be much better served if we not only close a contract with Schenley for the present but that you also develop your other markets using perhaps the other alternative, i.e., a sliding scale alternative until you have your market so developed that with firm contracts we can also cover them for a whole year or a large portion of the year at firm prices.



(Testimony of Harold A. Whipple.)

I shall be most interested to hear from you at an early date with regard to this, but particularly would be interested in word from you as to the development of a more diversified group of customers on whom we both can depend for continuing business as you establish your market and we establish our sources.

For your further information, this letter is to advise you that there are also available, quantities of corn starch which are presently priced at \$1.15 per kilo, F.O.B. Buenos Aires. There are available right now, 50 to 100 tons monthly, starting July till December. The shipment of corn starch is made in double bags, the inner one is made of a special paper and the outside bag is of cotton. The net weight is 50 fillos each.

There are also available 100 to 200 tons of honey, ready to be shipped. 50 to 100 monthly, which presently is priced at x Pesos \$1.25 F.O.B. Buenos Aires.

The honey would be ready for shipment at the end of June and also in July and August. The exportation of same is made in barrels of gum-wood, similar to the barrels of glucose and the weight is 300 kilos net and 330 gross.

If you should have any interest in either of these items, please advise us by cable as to the quantities, deliveries needed, etc., giving us a firm price at which to establish our contacts or better yet, giving us a range within which we should do business.

(Testimony of Harold A. Whipple.)

I cannot help but regret that you did not accept our earlier suggestion on glucose which was along similar lines i. e., that you give us a range and quantities desired and let us take the steps necessary to cover.

Such a condition makes it definitely imperative that we arrange our respective programs with "all the cards on the table" so that we will both know the manner in which we must deal with the entire program in order that both our organizations may deal with it with continuing success.

With kindest regards and looking forward to hear from you at a very early date, I am,

Sincerely yours,

CIA. ENGRAW COMERCIAL  
E INDUSTRIAL S.A.

/s/ G. FRED BERGER,  
President.

GFB:MBF

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Q. (By Mr. E. B. Stanton): Mr. Whipple, I show you what purports to be a copy of a telegram dated May 20th to Whipple, signed Engraw, and ask you if you recall receiving such a cable as that?

A. Yes.

Mr. E. B. Stanton: Now counsel has stipulated that I may use this copy in place of the original for my next exhibit.

The Court: All right.

The Clerk: Plaintiff's Exhibit 20, in evidence.

(Testimony of Harold A. Whipple.)

PLAINTIFF'S EXHIBIT 20

All America Cables and Radio

May 20th, 1946

Carta Telegrafica  
(1/3 De la Tarifa)

NLT Whipl

LosAngeles

You cannot delay twelve days and expect same price market fluctuating seriously immediate answer required if interested at onetwentyeight also need answer ourlet ninth recontract for nineteenforty-seven.

ENGRAW.

CIA. ENGRAW COMERCIAL  
E INDUSTRIAL S.A.

G. FRED BERGER,  
President.

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Q. (By Mr. E. B. Stanton): Referring to that cable for the moment, Mr. Whipple:

“You cannot delay twelve days and expect same price market fluctuating seriously immediate answer required interested at onetwentyeight also need answer ourlet ninth recontract for nineteenforty-seven.”

To what does that cable refer, Mr. Whipple?

The Witness: Previously——

Mr. Bronson: I think that the cable is the best evidence of what it refers to, if you want to——

Mr. E. B. Stanton: Well, I am speaking of

(Testimony of Harold A. Whipple.)

when the cable says: "You cannot delay twelve days." What delay was that?

A. That would refer to communication from Engraw of May 9th, I believe, in which they had quoted the 1300 tons [92] at one twenty five. That is my present recollection, without referring to the papers.

Q. Then you sent your telegram on May 20th confirming 1300 tons and you received this by way of reply?

A. That is right.

Mr. E. B. Stanton: That is all.

The Court: Have you any further questions?

Mr. Bronson: I have this in mind, Judge: That there are some long letters put in here, that they are new matter to us; we haven't seen them before. I would suggest that there may be. Mr. Whipple lives here. We could call him back later and we can reopen at any time.

Mr. L. B. Stanton: I will so stipulate.

Mr. Bronson: He will be available.

The Court: Well, I do not like to leave cross examination open—if you want to leave it open until tomorrow, all right, but I don't want to leave it open——

Mr. Bronson: Until tomorrow morning, then.

The Court: Well, you can leave it open until tomorrow morning.

Mr. Bronson: That is all I want to ask.

The Court: All right. We will reserve it.

Mr. L. B. Stanton: You want him back the first thing in the morning?

(Testimony of Harold A. Whipple.)

Mr. Bronson: Yes. I don't like to bother him, but it [93] would be safer to have him here.

The Court: All right. Then, subject to that, you will return tomorrow morning——

The Witness: Yes, sir.

The Court: ——for any further cross examination. After that, we will excuse him, unless you recall him. All right. 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken until Wednesday, June 2, 1948, at 10:00 o'clock a.m.)

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## REPORTERS' TRANSCRIPT OF PROCEEDINGS

Wednesday, June 2, 1948

The Court: All right, gentlemen, let us proceed.

Mr. Bronson: Before I proceed this morning, I might say, if your Honor please, that I discussed with counsel for the plaintiff the matter of your Honor considering the depositions that will be offered in evidence here, whether they are to be read from the witness stand or whether your Honor will read them yourself?

The Court: Well, my custom is, if they are offered, to order them transcribed in the record and I read them in between time, but before I do that, I either pass on objections that are made that are contained in them or ask for a stipulation waiving

the objections, because otherwise, to use the language of the street, I am buying a pig in a poke.

Mr. Bronson: Yes, that is right.

The Court: And I don't do that.

So, if you gentlemen would either stipulate, as I have indicated, or we will take up the specific objections as to each.

You need not take time to read them. I can read them faster myself and I don't mind reading in between, and I will read them before the case is ready for argument. That covers the situation.

Mr. Bronson: You take up your objections verbally, [151] rather than by written specifications or objections at the time the depositions are submitted?

The Court: Well, I presume the depositions are in the usual form and they reserve all objections except as to form.

Mr. Bronson: A great many of them are on written interrogatories, your Honor.

The Court: Well, where there are written interrogatories, there is no need to repeat the objections, because you made your objections at the time that the interrogatories were propounded, and it is repetitious to repeat the objections.

Mr. Bronson: All right.

The Court: Any objection, now, insofar as to an interrogatory is concerned, should relate to the answers, namely, that the answer is not germane to the subject. Many a time a question appears to be relevant and yet, when the answer is given,



the contrary appears. So that should be covered by motion to strike.

Mr. Bronson: Well, I think our question is answered, then. It makes a difference in how much time we are going to take and I thought we ought to bring it up this morning so we would be advised.

The Court: That is right. There is no particular practice, there is no uniformity of practice among the Judges, but, that has been my practice all the time on this [152] bench and also on the Superior Court bench, because 60 per cent of my work in the Superior Court was in a non jury department where the problem of depositions was before me all the time, and we have the same problem here, especially in certain types of cases, like maritime cases, as you know some of them are tried entirely on depositions, and it is very, very rarely that you do not have four or five depositions in an admiralty case, and then, rather than take time we arrange it that way. [153]

I referred when this case came up for trial to what I did in a case that I tried in San Diego where certain depositions were not available, so I kept the case open and they were brought in and I read them and the others prior to the argument. It is merely saving time. It is only when we have a jury that you have to read them, because you cannot give depositions to a jury to take out to the jury room.

Mr. L. B. Stanton: I think, your Honor, coun-

sel addressed himself with regard to whether they would be written objections or oral objections. I believe in both instances we actually referred to the answers rather than to the questions themselves.

The Court: I cannot see how in the course of a trial objections need to be in writing. You have already presented your objections to the interrogatories.

Mr. L. B. Stanton: That is right.

The Court: Your objections to the answers, or motions to strike, of necessity must be oral because they are objections to the contents of the deposition after it has been opened and filed.

Mr. L. B. Stanton: That is correct.

The Court: So I will be glad when the situation develops to take up each of the interrogatories, each group of answers to the interrogatories, and entertain any [154] objections that you have to them before they are in evidence.

Mr. Bronson: All right, your Honor; that makes it clear.

The Court: And that applies to the depositions also.

Mr. Bronson: All right. I think that satisfies it, your Honor.

Would you take the stand again, please, Mr. Whipple?

## HAROLD A. WHIPPLE

(Recalled)

## Recross-Examination

By Mr. Bronson:

Q. On the redirect examination yesterday, Mr. Whipple, some correspondence between you and the Engraw Company was put in evidence the last thing yesterday afternoon. Is there any other correspondence between you and Engraw from the date, let us say, the 1st of April, 1946, until the 23rd of May, 1946, on the subject of the basis of your activities with them or for them?

A. What were those dates, again, Mr. Bronson?

Q. From April 1st—I think your first letter that was added yesterday was April 3rd, earliest in time—say from that date forward until May 23, 1936, any other correspondence or communications between you bearing on the subject?

A. I am not positive, Mr. Bronson, as to what has been entered in evidence, whether there is anything additional or not. [155]

Mr. Bronson: Can you gentlemen assist on that? The witness says that his memory is not the best on it.

Mr. E. B. Stanton: What were those dates?

Mr. Bronson: April 1st until May 23, 1946.

Mr. E. B. Stanton: Letters bearing on the subject of the relations?

Mr. Bronson: With Engraw; yes.

Mr. E. B. Stanton: You are referring to correspondence from Engraw to Whipple?

(Testimony of Harold A. Whipple.)

Mr. Bronson: And the other direction, too, Whipple to Engraw. I think the term I used was "communications." I did not mean to limit it to letters.

Mr. E. B. Stanton: I don't know whether all these have bearing on this testimony. (Counsel conferring.)

Q. (By Mr. Bronson): I am handing you the Exhibit No. 4 for plaintiff, which is your letter, Mr. Whipple, of May 23, 1946, directed to the attention of Mr. Baglin. You will recall identifying that. After glancing at it do you identify the letter and have it generally in mind? A. Yes.

Q. Was that, in general, the substance of the telephone conversation that you testified you had with Mr. Baglin preceding the dictating of this letter?

A. In substance. There might have been other matters. I don't know. [156]

Q. You say there might have been other matters?

A. Yes.

Q. Leaving out amenities, social amenities and things of that kind, was this the substance of the conversation you had with him on the subject of glucose?

A. As it related to this 1,135 tons, certainly.

Q. You sent that letter, as I understand it, on the date on which it was dictated, the day on which it is dated? A. Yes, sir.

The Court: Mr. Bronson, what exhibit are you talking about?

(Testimony of Harold A. Whipple.)

Mr. Bronson: That is the Plaintiff's Exhibit No. 4.

The Court: May I see it, please?

Mr. Bronson: Yes. If your Honor please, these letters that have been supplied are important to us. We will need a little time to examine them, and before either returning them to counsel or putting them in evidence. So that concludes the examination of Mr. Whipple, with the possibility of our asking to admit these documents last supplied us. If counsel will stipulate that we do not have to identify them by Mr. Whipple, he need not remain in the court room.

Mr. E. B. Stanton: I will so stipulate.

Mr. Bronson: All right, thank you. That concludes the cross-examination.

The Court: Mr. Whipple, you reside here? [157]

The Witness: Yes, sir.

The Court: And you do not contemplate going away in the next few days?

The Witness: No, sir.

The Court: You will be excused with the understanding that if a situation should arise in the next few days and if counsel desires to recall you for any further examination, either side, that you will respond to a telephone call.

The Witness: . Yes, sir; I will do that.

The Court: Of course, they will give you notice enough to get here.

The Witness: Yes, sir.

The Court: All right. Gentlemen, call your next witness.

Mr. E. B. Stanton: If the court please, we are just straightening out the exhibits here.

G. FRED BERGER

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: G. Fred Berger, B-e-r-g-e-r.

The Court: Gentlemen, I notice that this is marked Plaintiff's Exhibit B to a deposition. I do not know whether my attention was called to that at the time it was introduced [158] in evidence or whether you identified it so we would know where it came from. Did we?

Mr. E. B. Stanton: That was Plaintiff's Exhibit what, your Honor?

The Court: Exhibit 4.

Mr. E. B. Stanton: Plaintiff's Exhibit 4.

The Court: Did you take it out of a deposition?

Mr. L. B. Stanton: We took depositions, your Honor, and marked it, and I think we took the depositions of Mr. Donnelly and Mr. Baglin, and in one of those depositions perhaps the document was marked.

The Court: It is marked No. B but it does not show whether it came from the original depositions on file or not.

Mr. Bronson: I can assist you on that, your Honor.



(Testimony of G. Fred Berger.)

The Court: Pardon?

Mr. Bronson: I can assist you on that. It was not attached to the original deposition.

The Court: That is all right. The clerk has to account for the exhibits which are attached to depositions and for that reason I asked the question.

Mr. L. B. Stanton: We just marked that in order to identify it for the purposes of the deposition.

The Court: As long as it did not go into the deposition it is all right. Let us go on. [159]

### Direct Examination

By Mr. E. B. Stanton:

Q. Your full name, please?

A. G. Fred Berger; 1272 Arenales, in Buenos Aires.

Q. How long have you been a resident of Buenos Aires? A. About four years.

Q. Are you connected with the plaintiff corporation? A. Yes, sir.

Q. For how long a time?

A. Since its inception in 1944.

Q. Do you hold any position with that corporation? A. I am president of it.

Q. How long have you been president?

A. Since its inception.

Q. When was the plaintiff corporation's inception?

A. I believe the general application for license to operate was filed in August, 1944, and the ac-

(Testimony of G. Fred Berger.)

ceptance was finally granted or the charter was finally granted more or less in March of '45, but operative about August sometime.

Q. Mr. Berger, prior to the inception of this lawsuit have you had any occasion to employ counsel for the corporation?

A. In the Argentine.

Q. Have you had any counsel in the United States?

A. Yes; we had counsel in the United States in February, 1944.

Q. Who was that counsel?

A. Louis B. Stanton.

Q. Prior to your association with plaintiff corporation, can you give the court a resume of your general business experience?

A. Well, I have been in the banking business for approximately 34 years, starting as a youngster in Buffalo, New York and working through various banks in that area, then becoming, out of an appointive civil service list, New York State Bank Examiner for a period of about 10 years, with most of that period spent in New York City and specializing particularly in examining foreign departments of the larger banks and foreign banking corporations operating under Section 25 of the Federal Reserve Act. Those are corporations where national banks are permitted to own shares.

In addition to that I have lectured in the American Institute of Banking, which is an educational

(Testimony of G. Fred Berger.)

section of the American Bankers' Association, for—well, from 1918 more or less to 1938, after which I have been a member of the faculty of the graduate school of banking at Rutgers which is the bank officers' school, for a period of about eight years.

I have also assisted in writing several text books on [161] banking and, of course, all through this period I have been lecturing on the subject of banking as well. I think that would—oh, in 1924 I spent a year with Lybrand, Ross Bros. and Montgomery as their bank system and bank analyst specialist, and after that, operated or helped to operate a bank in Norristown, Pennsylvania known as the Norristown Penn Trust Company, during which time I was active in both the Pennsylvania Bankers' Association and the American Bankers' Association, particularly having to do with the bank management commission of the American Bankers' Association and several other commissions, and being chairman practically throughout that period of the so-called committee on bank management problems of the Pennsylvania Bankers' Association.

I think that about does it. [162]

Q. (By Mr. E. B. Stanton): In the course of your banking experience, have you had occasion to deal with and become familiar with procedures concerning the issuance of letters of credit in foreign transactions?      A. Yes, sir.

Q. Are you conversant with the Spanish language, Mr. Berger?

(Testimony of G. Fred Berger.)

A. Well, I can read it and understand it much better than I can speak it, but I can speak it sufficiently well so I don't get lost in Buenos Aires or Montevideo.

Q. Now, you spoke of the plaintiff corporation having operated several years. Can you tell us, what is the nature of their business in general?

A. Well, it is both export and import. We purchase very largely greasy wool in the Argentine and ship that to the United States. We are working on other products, also, to ship from the Argentine and from Montevideo, Uruguay and, later, now, Brazil, into the United States, in order to offset the dollar exchange program which is now the subject of so much difficulty.

So far as imports into the Argentine and Uruguay are concerned, we represent a very large number of organizations, such as Atlas Diesel Engine Corporation in Oakland, California, Higgins, Incorporated, the boat builder in New Orleans, Butler Manufacturing Company in Kansas City, Richmond, [163] California, Minneapolis and Galesburg, Illinois, on the question of grain tanks, grain elevators, et cetera, et cetera and et cetera.

Q. Do you know the witness Harold Whipple?

A. Yes, sir.

Q. How long have you known him?

A. Since May, 1945.

Q. Have you since that time had any business relations or dealings with Mr. Whipple?

(Testimony of G. Fred Berger.)

A. Our relations dealt with correspondence looking toward the possibility of export or import of articles out of the United States to the Argentine and from the Argentine into the United States.

Q. And over what period of time did these negotiations and transactions take place?

A. Well, from May, 1945, when I was here, to May—June, 1946 when the situation which we are discussing now came to a head.

Q. Do you know the defendant corporation, the Schenley Distillers, know of them?

A. Yes, sir.

Q. Did your firm or did you ever purchase any glucose in the Argentine during 1946 to the account of Schenley Distillers? A. Yes, sir. [164]

Q. Now, when, and how much did you purchase?

A. We purchased a total of 1,535 tons, on various contracts running from in the latter part of May—the dates I don't recall offhand—starting about the 22nd of May or the 23rd of May.

Q. Did you purchase this 1,535 tons all at once?

A. No. We purchased 1,535 tons. Well, we first talked of 600 tons and finally purchased 1,135 tons and then later added an additional 400 tons as a separate transaction.

Q. Well, when did you make your first purchase; at or about what time did you make your first purchase of 600 tons, if you recall?

A. That purchase was made upon the receipt of a final confirming cable which must have reached us



(Testimony of G. Fred Berger.)

on the 22nd of May, because I believe that is the date of the first actual purchase, actual signing of a contract.

Mr. E. B. Stanton: Will counsel stipulate that Mr. Berger sent all these cables or received the cables which are directed to his attention, without having him identify each one?

Mr. Bronson: That is all right, and if you will tell us what number it is, so we can refer to it in the transcript.

Q. (By Mr. E. B. Stanton): Now, Mr. Berger, I am going to show you what is designated as Defendant's Exhibit B, ask [165] you to examine it and see if that coincides with your recollection as to the date of the 600-ton transaction? (Mr. E. B. Stanton hands document to the witness.)

A. That is right. That was subject to prior sale on the 21st, so we were waiting to hear from Mr. Whipple.

Q. And thereafter you purchased up to a total of 1135 tons? A. That is right.

Q. Now, prior to that date, have you had occasion to make any particular study of the glucose market in the Argentine or in South America?

A. At that time we were just inaugurating a study of the whole market for the simple reason that we, as I have stated earlier in my testimony, were working with Mr. Whipple toward the establishment of a continuing market for glucose. Our arrangement for the marketing of the product,



(Testimony of G. Fred Berger.)

one of the manufacturers in the Argentine, and Mr. Whipple and any other agent who was on the Coast, for instance, Mr. Whipple on the west, that was all in the process of working—of evolvement so that a continuing market could be arranged, contracts could be projected and the whole thing gradually evolve into what we call bread and butter accounts, accounts that continue all the time and from the commission of which our general overhead is paid.

Q. Mr. Berger, in making a study of the market [166] conditions relative to glucose (I have reference to price in that regard), what investigation did you make?

A. Well, naturally, like my earlier statement as to what we were doing, it has to more or less provide or lay the groundwork for what I want to say now, and that is that as a part of that study we naturally ascertained the general price levels, through our broker who handled that particular type of transaction or who would have handled it if we had evolved our original plan, and who later handled our transactions or the majority of them in the United States, of our purchases for Schenley and in that study the question of fluctuating prices would naturally have come under careful consideration.

Then, when this particular program rather speeded up our study so that we had to take the steps rather quickly to ascertain all of the detail

(Testimony of G. Fred Berger.)

in connection with the market, particularly as the market was fluctuating rapidly and we had to put ourselves in a position where we could act as quickly as possible, after we knew definitely what was wanted——

Q. (By Mr. E. B. Stanton): Mr. Berger, can you tell us the glucose situation in the Argentine? Are there many manufacturers or few, or what is the situation?

A. Actually, there are only two manufacturers of glucose.

Q. You are speaking now of the basic manufacturers?

A. Of basic manufacturers of glucose, there are only [167] two, and one of those is tied up with a company in the United States, so that, to all extents and purposes, for a general market, there is only one.

Q. Now, as a practical purpose, what happens to the products manufactured by this one or the two manufacturers, do they sell and direct or what do they do?

A. Well, up to now, they have been selling to various buyers, in other words, middle men. Our program was to have eliminated at least a part of those middle men and have dealt directly from the manufacturer, through our agent in the United States, with the purchasers themselves.

Q. Were you successful in that arrangement?

A. Well, we have——

(Testimony of G. Fred Berger.)

Mr. Bronson: I think, your Honor, unless there is some showing of what the purpose of this is, that it does not connect up with the complaint and causes of action here. I can't get it. We object on the grounds it is incompetent.

The Court: Well, I think preliminary inquiry is justified but not to the extent which this inquiry presages.

Mr. E. B. Stanton: Well, if your Honor is satisfied yourself, up to date, so far as the witness has gone, if he has given a sufficient groundwork on the glucose market——

The Court: Well, I am not passing any judgment as to your qualifying him as an expert.

Mr. E. B. Stanton: That is correct. [168]

The Court: I mean that relates to his experience in the case, but we are not interested in the Argentine commerce at all or the manner in which they conduct things there. We are interested merely in the particular transaction and any testimony that this gentleman is going to give as an expert should be based on his knowledge of the market, but all the relationship between a particular concern or with the consumers in the United States or that are not in the United States is foreign to the inquiry in which we are interested.

Q. (By Mr. E. B. Stanton): Mr. Berger, at or about the period from the 20th of May to say the 24th of May, based on your study and inquiries which you made at that time, what was the struc-

(Testimony of G. Fred Berger.)

ture of the glucose market from the standpoint of was it steady or was it fluctuating?

A. It was fluctuating quite rapidly, rather from the 1st of May to the period that you mentioned, the 23rd of May.

Q. Can you give us any idea what that change of fluctuation was?

A. Yes. I recall around the 1st of May the glucose was selling at about 1.10 a kilo, that is a peso, 1.10 a kilo and it gradually advanced to 1.20 a kilo during the month.

The Court: Is that a product of sugar?

A. Corn. [169]

Q. Glucose is made out of corn?

A. This glucose. They do make it out of beet sugar, but this particular glucose was made out of corn.

Q. (By Mr. E. B. Stanton): Was there any standard on the glucose manufactured in the Argentine, that you know of?

A. Well, the requirement is that the glucose manufacturer must use the U.S.P. standard of Baume 43-45.

Q. You stated that you purchased some glucose for the defendant, Schenley Distillers. From whom did you purchase this total I believe you mentioned, of 1,535 tons over a period of time?

A. Well, I can tell from whom. I can't tell how much,

From S.I.F.A.R., from R. H. Gonzalez & Cia,

(Testimony of G. Fred Berger.)

from Auge Freres, and from Eugenio Lang; and there is one other whose name I can't remember.

"Intercont" is the other one.

The Court: Auge is the Spanish name for Brothers.

The Witness: For Brothers.

Q. (By Mr. E. B. Stanton): Mr. Berger, I show you some photostatic copies of some documents and ask you if you can identify these and tell us what they are? If there are any duplications there, I just want one of each.

A. These are contracts for the purchase of glucose. How much detail do you want?

Q. Are these the contracts that you are speaking of [170] with the suppliers that you mentioned? Would you examine them and pick out one for each supplier? If there are any duplications, put them in their proper fashion.

The Witness: S.I.F.A.R. is 1000 tons.

Mr. E. B. Stanton: Just lay the S.I.F.A.R. one aside.

The Witness: R. H. Gonzalez—

Mr. E. B. Stanton: Is this a duplicate of this?

The Witness: No. There are two contracts.

R. H. Gonzalez & Company, 200 tons; Auge Freres & Company, 75 tons; Eugenio Lang, S.R.L., which means limited, 50 tons; Francisco J. Pedmonte, 60 tons; and "Intercont," 150 tons, in two contracts.

Mr. E. B. Stanton: Do you know where the originals of these documents are?



(Testimony of G. Fred Berger.)

A. Yes, the originals of the documents are filed with the Livestock Exchange in the Argentine, in Buenos Aires, because those forms are written on Stock Exchange forms.

Q. Are the originals of these documents available to you?

A. No, except to look at. But, they are filed definitely with the records in the Stock Exchange.

Q. Are these the only copies that you have of those documents? A. Yes, sir.

Mr. E. B. Stanton: I ask that these be introduced in [171] evidence as a group exhibit, as Plaintiff's exhibit next in order.

The Court: Let me see them.

Mr. E. B. Stanton: Those are not individually translated, your Honor.

The Court: Do you want them as one exhibit?

Q. (By Mr. E. B. Stanton): That is a total of 1,535, is it, Mr. Berger?

A. Yes, that is right. That is the total of 1,535 tons.

Q. Was it a thousand from S.I.F.A.R.?

A. Yes. There are 400 and 200. The 400 S.I.F.A.R. is the extra 400 added to the 1,135.

Mr. E. B. Stanton: I would suggest one group exhibit, your Honor.

The Court: Well, I think if you do that, we will mark them, give them A, B, C and D—give them one number and then identify each as it is referred to. This is a tax stamp, Impuesto.



(Testimony of G. Fred Berger.)

The Witness: You are thinking of a warehouse receipt there. This is merely a *contracto*.

The Court: No. I mean this paper is a stamped paper, a paper on which you pay a tax.

The Witness: No, I don't think it is on the exchange. This is not on stamped paper. That is on stock exchange [172] form.

Mr. E. B. Stanton: Perhaps we might have the witness identify this group exhibit, A, B and C—and give the contents, the names of the companies, for each one.

The Court: You see, it is a form that went through the Chamber of Commerce at Buenos Aires.

The Witness: That is Stock Exchange.

The Court: Is that a stock exchange?

The Witness: That is a stock exchange.

The Court: All right.

The Clerk: Are these admitted, your Honor.

The Court: They may be received as one exhibit.

The Clerk: This is Plaintiff's Exhibit 21, 21-A, 21-B, 21-C, 21-D, 21-E, 21-F, 21-G, in evidence.

Q. (By Mr. E. B. Stanton): Now, prior to the signing of these contracts, Mr. Berger, did you make any investigation concerning the export situation in Argentine?           A. Yes, sir.

Q. When?

A. I would say over a period of at least a month prior to the time of the development of this parti-

(Testimony of G. Fred Berger.)

cular business, because as I testified earlier—it could have been more than a month because there was a good deal of study made in it—we were evolving or attempting to evolve a program with Mr. Whipple, in connection with this general export of [173] glucose, so that we were studying the market at the time, and then when this purchase—or when we started exchanging these cables and letters with regard to something specific, we then made a specific study of the procedure so that we would be in a position to act as soon as it would become necessary.

Q. (By Mr. E. B. Stanton): What did you learn as a result of this investigation or study concerning the export arrangements in the Argentine?

Mr. Bronson: I am going to object to that, as hearsay, if your Honor please.

Mr. E. B. Stanton: If the witness is familiar with the requirements of export at that time, I think it is rather essential to the case.

Mr. Bronson: It may be essential to the case. The objection is to the way you are going about getting it in the record.

Mr. E. B. Stanton: Well, the witness is in the import-export business. He is bound to be familiar with it.

The Court: I don't know what you are trying to prove, whether you are trying to prove a regulation——

Mr. E. B. Stanton: No.

(Testimony of G. Fred Berger.)

The Court: ——with reference to which the witness would not be qualified, or whether you are trying to prove a custom of trade. I can't tell by the question. [174]

Mr. E. B. Stanton: I am endeavoring to get to the point of the fact that he complied with the requirements in existence at that time for procuring of an export license, which was done.

The Court: Well, the main point, then—then the question of requirement is not a proper subject of examination, but the question is what he did. You may ask him what he did.

Mr. E. B. Stanton: All right.

The Court: In order to start this deal in motion.

Q. (By Mr. E. B. Stanton): What did you do, Mr. Berger, with reference to securing of an export permit?

A. We ascertained that it was necessary to make an application to the Department of Commerce and Industry and more specifically to the subdepartment in that ministry having the export licenses in control, and we were advised that one the application had been——

Mr. Bronson: May I interrupt just a minute. As to what you were advised, I object to it as hearsay.

The Court: Well, I will allow the answer to remain, except the last paragraph, "We were advised——"

I think while you are examining that, we will take a short recess, gentlemen.

(Testimony of G. Fred Berger.)

(Whereupon a short recess was taken.) [175]

The Court: All right, proceed.

Q. By Mr. E. B. Stanton): Mr. Berger, did you make an investigation as to the requirements necessary to secure an export permit in May, 1946?

A. Yes, sir.

Q. And did you learn what those necessary steps were? A. Yes, sir.

Q. Will you now relate to the court the steps necessary to secure an export permit from the Argentine to the United States in May, 1946?

Mr. Bronson: We will object to that on the grounds, if your Honor please, that it calls for hearsay.

The Court: Well, to some extent any testimony about the permit would have to be hearsay as far as the defendant is concerned, but it is one of those cases which, of necessity, must be outside of the hearsay rule. In other words, there is no way to show, no matter who testified it would be hearsay so far as you are concerned. If you got the Government official who issued the permit to testify it would still be hearsay.

In other words, so long as there is a requirement, so long as you have insisted not only that it was necessary, but with a condition precedent stated at various times during the course of the various motions, a condition [176] precedent to see that a proper permit existed, then the granting of the permit therefore becomes a material subject of in-

(Testimony of G. Fred Berger.)

quiry. But all of it would of necessity be hearsay because it is not anything which relates to the defendant.

From another standpoint, however, it is this: Assuming that there is a contract and Engraw is required to not only purchase the glucose but also deliver it to certain carriers for transportation, then to the extent of making those arrangements and making them available, he becomes your agent so far as securing the proper permits which are necessary before he can deliver them to an agent or make an agent available for the purpose of exporting it out of the country. It is just the same as if, for instance, you were dealing in, say, an interstate contract and the order was f.o.b. Suppose it was relating to oranges or citrus fruits from Arizona to California, we know that a state has certain quarantine laws and certain inspection. While ordinarily these inspections take place at certain places—I forget, but I think it is Yerma as far as California is concerned, California and Nevada—it is common knowledge in the case of persons transporting foreign products into California which are subject to quarantine or inspection the state will arrange to have an inspection made before the border is reached and give the person a release. I myself have seen that done, coming from Nevada into California. [177]

Now, all that is hearsay so far as the buyer is



(Testimony of G. Fred Berger.)

concerned, but it could not be argued that in such a case the seller could not testify that he had complied with these matters and secured the permit.

I will overrule the objection. Besides, I call attention to this fact, gentlemen: That since the new rules have been in vogue, so far as I know no civil case has been reversed for violation of a rule of evidence such as the hearsay rule, because the Rule says that, while you are following the rules of evidence of the state where the court sits, it also says that we should decide questions in favor of admissibility or, rather, should follow the rules which favor admissibility rather than exclusion. So that in effect, my view of it is, which I have expressed repeatedly, that we are in the same position as the equity courts were before; that it was left to our good judgment to say what testimony shall be admitted.

I admit, for instance, that an entire case based upon hearsay and the like, and contained a flagrant disregard of some of the fundamentals of the principles, it would not have much of a chance of being sustained, but the incidental violation of one of the rules where no other proof is available because of various situations, it has never been made the basis of a reversal that I know of since the rules went into effect, and I have been on the bench ever since [178] they went into effect. I wrote a book on them, explaining them, and I have given a lecture in San



(Testimony of G. Fred Berger.)

Francisco to the Stanford Law Society, explaining the whole book of rules in two hours. It was quite an attempt to cover a lot of territory even in two hours.

Mr. Bronson: Of course your Honor is aware of the fact that the question was, first, whether he made an investigation and what developed.

The Court: To find out what was necessary. In other words, he is laying foundation for the requirements and then, of course, that will be followed by inquiry as to how the requirements were complied with.

Mr. Bronson: I would not have made objection, I take it, if he had asked him what are the requirements, without going into various types of information.

The Court: We will go back to the question.

The Witness: Would you give me the question again, please?

(Question read by the reporter as follows:

“Q. Will you now relate to the court the steps necessary to secure an export permit from the Argentine to the United States in May, 1946?”)

A. When the contracts are signed——

Mr. Bronson: Will you speak a little louder, please? It is hard to hear you. [179]

A. When the contracts are signed, and particularly if they are on stock exchange forms, as ours are, we being a member of the exchange, they

(Testimony of G. Fred Berger.)

must be registered at the stock exchange, after which, the contracts having been registered, an application must be filed, application for an export permit must be filed with the department, the subdivision of the Department of Commerce and Industry, the ministry of commerce and industry, which application is immediately considered. And then within three or four days after the application—three if you are in a hurry and four if you are not, or longer if you are not—you proceed with the required tax and pay the tax and obtain the necessary receipt for the tax and also the export permit.

Q. (By Mr. E. B. Stanton): You say with reference to this tax three or four days if you are in a hurry. Is there any time within which you must pay the tax that you know of?

A. No. It is more or less up to you. If you are in a hurry, they advise that it takes about three days to process the application through the normal routine.

Q. You mean after the tax is paid there is a lapse of three or four days before you get it?

A. Oh, no. You don't pay your tax until you are ready to get your permit.

Q. I see.

A. In other words, the first three days, a minimum of [180] three days would be required for processing the application through the various department sections, and then if you want your per-

(Testimony of G. Fred Berger.)

mit immediately, you immediately go and pay your tax. The initiative is up to you. If you are not in a hurry, you wait and you can get it any time, and then the department might call you eventually and say, "Well, what about this application for an export permit? What are you doing about it?"

Q. Were export permits for glucose to the United States being granted in the Argentine in May, 1946?

Mr. Bronson: I object to that as irrelevant, incompetent and immaterial, not the best evidence.

The Court: To that question I will sustain the objection. I think the question is not whether they were being granted or not, but whether this was granted. The objection will be sustained.

Q. (By Mr. E. B. Stanton): Now, Mr. Berger, what steps did you take in May, 1946, if any, towards the procuring of an export permit for glucose to the United States?

A. When the contracts were signed we immediately registered them at the—I say "immediately"—within the usual period of a day or so, sometimes the same day, registered them at the stock exchange and then immediately took steps to file our application with the department of commerce and industry. [181]

Q. Mr. Berger, I show you three documents and ask you if you can identify what these are?

A. Yes, sir.

Q. What are they?

(Testimony of G. Fred Berger.)

A. These are copies of the applications for permission to export.

Q. Calling your attention to this copy which you have identified as a copy of a petition to export, bearing the number 192,468, is that a copy of the application which your company filed for an export permit? A. Yes, sir.

Q. And what date did you file that?

A. On the 27th of May, 1946.

Q. Now, do you know where the original of that document is?

A. Yes; in the Department of the Secretary of Industry and Commerce, in the Department of Exportation and Importation.

Mr. Bronson: We can't hear the witness. He talks too low.

Mr. E. B. Stanton: Would you repeat that answer, please, Mr. Reporter?

The Witness: Yes.

Mr. E. B. Stanton: Let the reporter read it.

(Answer read by the reporter.) [182]

Q. How much glucose is covered by that particular application, Mr. Berger? A. 935 tons.

Mr. E. B. Stanton: I will ask that that be introduced into evidence as Plaintiff's next exhibit.

The Clerk: Admitted, your Honor?

The Court: It may be received.

The Clerk: That is PLAINTIFF'S EXHIBIT 22 in evidence.

Q. (By Mr. E. B. Stanton): I hand you these

(Testimony of G. Fred Berger.)

two remaining copies and ask you what date you filed those?      A. On July 4, 1946.

Q. And what are the amounts borne by each one?

A. No. 202,501 covers 200 tons and No. 202,502 covers 400 tons.

Q. You followed the same procedure which you have related in filing these two?      A. Yes, sir.

Q. And the originals are in the same place?

A. Yes, sir.

Mr. E. B. Stanton: I ask that these be introduced as a group Plaintiff's exhibit next in order.

The Court: All right, they may be received.

The Clerk: PLAINTIFF'S EXHIBIT 23 in evidence.

Q. (By Mr. E. B. Stanton): Now referring to the application designated as Plaintiff's Exhibit 22 which you [183] have testified you filed on the 27th of May, 1946, following the filing of this document did you receive any communications from the Department?

A. Yes. We received a communication from the Department asking us for manufacturer's certificates.

Q. I show you this document bearing the date "Buenos Aires, May 29, 1946," signed "Miguel Angel Ripa Alsina," which signature is stamped on the document, and ask you if you can identify that?      A. Yes, sir.

Q. What is that document?



(Testimony of G. Fred Berger.)

A. That is a letter which the Department wrote to us requesting us to file the necessary manufacturer's certificates which we had originally failed to file with the application.

Mr. E. B. Stanton: I note for the record that this document is in Spanish. I think counsel on all sides have seen it and read it.

The Court: I think, gentlemen, that we ought to put into the record, not exactly a translation, but a summary of the contents, and also in English. You may have those contracts if you want them.

Mr. E. B. Stanton: All right.

The Court: I will be very glad to do it.

Mr. E. B. Stanton: This is the first exhibit, your [184] Honor.

The Court: Which number is that?

Mr. Bronson: That would apply likewise to their exhibit 21.

The Court: I am coming to that.

This is a group of original contracts which recites the purchase and sale of a certain quantity of glucose. In a box at the top of each of the contracts appears a summary of the parties, the merchandise involved and the money value. The first item is the seller, the vendor, S.I.F.A.R.

Mr. L. B. Stanton: Excuse me, your Honor, that is more or less a translation.

The Court: Have you a translation?

Mr. L. B. Stanton: That is a translation of one of the documents.

The Court: I will give that one and then I will



(Testimony of G. Fred Berger.)

introduce this for the balance, because you do not have the top there. You do not have what I am reading.

Mr. L. B. Stanton: No; I do not have that top.

The Court: Then the next item is "Comprador" which is the purchaser, Compania Engraw S. R. L.

The Witness: This is a request until October.

The Court: "Plazo Operacion hasta oct." Until October; that is right. A total of imports, in the same line, [185] \$480,000. There is a dollar mark.

"Especie", coin; liquid glucose, tax \$48.25; quantity 400 tons. The price, \$1.200; Pesos/ton, then carried over—is that excise tax, "Derecho"?

The Witness: No. Let me see how that is done.

The Court: "Derecho" would mean a right.

Mr. Berger: It is a form of tax.

The Court: "\$24.15." Then commission  $\frac{1}{2}$  per cent; total \$72.40. Alongside of it is a stamp which reads "Bolsa de Comercio de Bs. As."; that is the stock exchange of Buenos Aires.

This is the tax stamp "Impuesto". National Office of Stamps, authorized No. 54, 29th of May, 1946.

The Witness: This is the whole stamp, your Honor, is merely a stamp showing the date on which——

The Court: It says official stamp. It is like a permit. It is something like our stamp permit where, instead of using stamps, you use a stamping machine, and that gives the tax \$48.25.

(Testimony of G. Fred Berger.)

Now, the text is substantially as shown by the translation.

Mr. L. B. Stanton: It varies some, your Honor, in each one. I made that as a sample. I do not think as far as this case is concerned the variations make any difference.

The Court: All right. Then the English translation [186] is given as a typical form, varying in quantities and the like, and all of them bearing the legend I have indicated, except different sellers, different amounts, and the same stamp, also, with different amounts.

Mr. E. B. Stanton: May I suggest, as long as your Honor has referred to the translation, that that translation be attached?

The Court: Be attached, that is correct. I was going to do that. The translation will be attached.

(Copy of translation of Plaintiff's Exhibit 21, 21-A, 21-B, 21-C, 21-D, 21-E, 21-F, 21-G with the exception of the top portions and variations heretofore noted by counsel.)

"Chamber of Commerce of Buenos Aires

"General receipt of purchase and sale issued in accordance with article 32 of Decree number 9432. Exclusive for goods not comprised in the series of bulletins of the Chamber of Commerce and merchant members of the Chamber of Commerce of Buenos Aires.

"S.I.F.A.R. Sociedad Anonima Reconquista 379 Buenos Aires sells to the gentlemen Compania En-

(Testimony of G. Fred Berger.)

graw S. R. L. San Martin 329 Buenos Aires through the agency of Mr. Mario Polastri-Corrientes 456 Buenos Aires the following:

“4,000 kilograms of maize glucose liquid crystal [187] concentration (43/45°) baume U.S.P. current produce of S. A. Juan B. Pezza, Ltd. packed in new wooden casks eight sunchos proper for exportation of approximately 300 kilos of net contents at the price of 1,200 pesos per 1000 kilos net weight, without casks placed at the side of the steamer in the port of Buenos Aires as ordered by the purchasers. Thereby acts of God, strikes in the shops of producers or lack of motive power in the producers such as may be subject to approval, the time of delivery will be extended as many days as such as the moving effect of the act of God lasts. The delivery will be made in the months of July, August, September and October of 1946 at the rate of 100 metric tons each time and each month. The weight will be taken in accordance with the original scale weights of the manufacturers. The purchasers will open not later than the 5th of June, 1946 and irrevocable credit in favor of the sellers confirmed of the First National Bank of Boston at 99 Florida Street, Buenos Aires. Payment will be made in Buenos Aires by drafts against presentation and delivery of bill of sale accompanied in each case by receipt executed by the receiver for purchasers. The credit must expressly stipulate [188] with the merchandise shall not have been received within

(Testimony of G. Fred Berger.)

the established period the invoice of the sales will be paid on the last day of each period. Against the invoices of the sellers accompanied by receipt (warehouse receipt) of deposit of the Catalinas or others duly endorsed by the sellers in favor of the purchasers. The seller will immediately procure for the purchase a letter of production of the merchandise for the purpose of exportation.

“The total value of the merchandise in possession is \$482,400.00 for the purpose of the stamps attached.

“If parties are subject to the regulations established by the Chamber of Commerce of Buenos Aires every question which may arise between the parties will be settled in accordance with that stipulated in the articles pertaining to the statute of the Chamber of Commerce of Buenos Aires for the legal purpose the parties place their special domicile of that of the Secretary of the Chamber of Commerce of Buenos Aires 299 Sarmiento State Federal Capital where citations commands and resolutions will be delivered. The parties sign the present ticket in duplicate of the same tenor and with the singular effect. [189]

(Testimony of G. Fred Berger.)

“Buenos Aires—29th day of May, 1946

Interlined purchasers letter of production of the merchandise for purpose of exportation.

SOCIEDAD INDUSTRIAL FINANCIERA  
ARGENTINA

S.I.F.A.R.

Sociedad Anonima

COMPANIA ENGRAW INDUSTRIAL  
COMMERCIA S. A.

“The ticket bears at the side number 478463A, bears at the top to be filled in by the contracting parties for the office original.

“Sale S.I.A.F.A.R. Soc. Anon. Purchaser Cis. Engraw S.R.L.

term of operation up to October. Total sale \$482,400.00.

Natural liquid glucose tax \$48.25 quantity 400 metric tons. Price 1.200-p/ton Tax \$24.15 Commission  $1\frac{1}{2}\%$  Total \$72.40.

Stamp Chamber of Commerce of Buenos Aires impost of stamps of the authorization No. 64. 29th of May, 1946. Tax \$48.25. The above is a sample translation of the order.”

The Court: 22 is an official form and bears the seal of the Republic of Argentina and the office of industry and commerce. General direction of external commerce, direction office of export and import.

And then it reads *Solicitud De Permiso De Exportation*, it's on application for permission to export, and then it gives the name of the applicant



(Testimony of G. Fred Berger.)

company, Engraw, and so forth, with Domicile office at (2) Calle San Martin, street and number 345; City, Capital, Buenos Aires; Province or territory is blank. No. 2514. And then there is a place marked for revenue stamps, Estampillas Fiscales; Destination, on the I is given; destination, United States of America. Customs House of Departure, Federal Capital.

II.—Articulos Que Solicita Exportar:

Articles of merchandise we desire to export. On the side, in one column is given quantity in net kilos, 935,000.

Then a description is given for corn glucose, liquid crystallized, in wooden barrels. Industria Argentina, showing it is of Argentine manufacture, and in the last column on the right is the value, F.O.B., and it says 1,215,500.—I presume that is in their pesos. That is pesos.

Then, carried below is the amount, 935,000 and the value 1.215.500 pesos.

The remainder of the blank is not filled in, and across the top part, center and bottom parts, across the face of the instrument are three stamps, each marked Copia, which is copy.

I have read the front part of the exhibit, except the number which appears on the extreme right top in red ink, [191] one number, export number 192468.

The reverse of the exhibit which constitutes portions marked in Romans III and IV are not signed.



(Testimony of G. Fred Berger.)

Below that is a statement which reads in substance:

“I request that the Director of Exports authorize the name of the firm to export the merchandise which I have specified in the present document as to which I declared under oath, in conformity with the provisions of law No. 12, 591 that the information therein set forth is a true reflection of truth.” That is your purple patch in Spanish language. The portion is printed and there is typed “Buenos Aires,” the 27th of May, 1946, and a place for seal and signature.

Gentlemen, have I translated those for the record, to your satisfaction?

Mr. E. B. Stanton: Excellently.

Mr. Bronson: All right, your Honor.

The Court: All right.

Exhibit No. 23 is on the same form. It consists of a copy and a duplicate, a duplicate copy.

The Witness: That is not a duplicate.

The Court: What is that?

The Witness: That is a second application.

The Court: A second application?

The Witness: It happens to be a second application.

The Court: It says duplicate copy. [192]

The Witness: They are all duplicates.

Mr. E. B. Stanton: They are all duplicates, of originals which are on file.

The Court: This is a different one.

(Testimony of G. Fred Berger.)

Exhibit 23 consists of two, which are on the same form, and the first one has the number 202501. The applicant is the same company. The domicile is the same, and the destination is given as the same. The merchandise is the same. The quantity is different, 200,000 net kilos, and value 260,000 pesos. This one contains, under Subdivision III the name of the manufacturer, S. A. Juan B. Pezza Ltd., I presume it means Limited, and the residence, place of residence is given as Oncativo 815 (Cordobe).

Under Miscellaneous there is added the following legend, inserted in typewriting: Accompanying the present averment is a certificate or proofs of the sale according to export Number 192.468/46. That is a copy of the telegram.

The next exhibit, which is blue-green, is shown on a similar paper except that it has a stamp that it is a duplicate. The date of the execution of the instrument is the 4th of July, 1946, at Buenos Aires and the place is given as at Buenos Aires.

The next one is on the form which is identical except it is marked duplicate in Spanish. It gives the name of the applicant as Cia Engraw, giving its place of business as the [193] same; exportation destination, United States of America. The merchandise is the same. The quantity is 400,000 kilos and the value 528,000 pesos.

The name of the manufacturer under subdivision III is given as S. A. Juan B. Pezza, Limited, and the address is the same.

(Testimony of G. Fred Berger.)

Under Miscellaneous, there is added, "Attached here are two certificates," detailed certificates, certificates of correspondence and a copy of the telegram, corroborative of the sale made, and this is dated July 4th, 1946, at Buenos Aires.

All right.

Q. (By Mr. E. B. Stanton): Now, Mr. Berger, I call your attention to the space for signature on the reverse side of Plaintiff's Exhibit No. 22. Do you recall whether or not you signed the original document which was filed?

A. It was either my signature or Captain Andres del Borgia, our vice president, either one of us would sign.

Q. Now, Captain Andres del Borgia, that you have spoken of as your vice president, what are his duties in the organization?

A. Well, he is also import manager. His duties in the organization are the same—his designated duties in our organization are when I am away, just the same as are mine, with certain limitations, within certain limitations, and other than that, he operates as import manager. [194]

Q. Is that under your direction and control?

A. Entirely under my direction and control.

Q. You supervise his activities, then?

A. Yes, sir.

Mr. E. B. Stanton: You have identified this letter of May 29th. I believe I will introduce this in evidence and ask the Court to read into the record the translation of that record.

(Testimony of G. Fred Berger.)

The Court: All right.

The Clerk: Plaintiff's Exhibit 24 in evidence.

The Court: All right. This is a letter on the stationery of the Secretary of Industry and Commerce, the Republic of Argentine, Director General of Export and the Office of Export.

General Manager, Company Engraw, and so forth, giving the address.

Please refer to Chemical Products Export Numbers 192.468-46.

I better read this first, before I translate it into English. (Reading)

We call your attention to the fact that in order to act on your request relating to the above export, it is necessary to transmit to this office certificate of the manufacturer stating the quantity of glucose about to be exported.

At the same time, we are pleased to inform you that [195] within 24 hours from this date if we do not receive the document necessary, your request will be abandoned and it will be deposited in the archives of this office.

Yours sincerely,

Signed Miguel Angel Ripa Alsini,

Head of the Division of

Permits for Export.

And the seal of the Secretaria or the Office of Industry and Commerce of the Argentine Republic and of the Office of Export.

That is all.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: Thank you.

Q. Did you comply with the request of that letter, Mr. Berger? A. Yes, sir.

Q. I show you a carbon copy purporting to be a carbon copy, bearing date May 30, 1946, bearing the typed signature of Andres del Borgia, and ask if you can identify that? A. Yes, sir.

Q. From where was that paper produced, do you know?

A. This paper is a copy of the letter that we wrote to the Director General of the External Commerce.

Q. Where did you procure that copy?

A. In our office.

Q. As part of your office files?

A. As part of our office files, yes, sir. [196]

Q. This is the reply, then, to the letter which the Court has just read into the record?

A. That is correct.

Q. And I note that it bears a designation at the bottom. What does that designate?

A. That enclosure was No. 16, "certificados de elaboracion," which means certificate of manufacture.

Q. Do you know whether or not that was used, enclosed and sent to the Department?

A. Yes, I do.

Mr. E. B. Stanton: We ask that this be next introduced in evidence.

The Court: All right.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: And we ask that the Court read it.

The Clerk: That is Plaintiff's Exhibit 25, in evidence.

The Court: This is a copy of a letter dated May 30, 1946, bearing the address, new address of the defendant, and the telephone number, addressed to the Office of Secretaria of Industry and Commerce, General Director, External Commerce, to the Chief of Division of Export, Miguel Angel Ripa Alsina, re Chemical Products No. 192.468-46.

Acknowledging receipt of your letter of the 29th instant in which you inform us that in order to act on the request for export above referred to, it is necessary to transmit to your office certificates of the manufacturer, giving the [197] quantity of corn glucose about to be exported.

In compliance with the regulations, we are pleased to transmit to you this day the required documents.

And then even a more flowering "Yours truly," Cia. Engraw, and so forth, by Andres Del Borgia, the manager of the Import Division.

At the bottom is shown "Attached No. 16 Certificates of Manufacture."

Mr. E. B. Stanton: Thank you, your Honor.

The Court: Yes.

Mr. E. B. Stanton: If I may suggest, I have only about half completed my examination.

The Court: I was waiting for a good place to stop. Is it a good place now?



Mr. E. B. Stanton: This is the spot.

The Court: All right, 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day.) [198]

Los Angeles, California, Wednesday, June 2, 1948,  
2:00 p.m.

G. FRED BERGER (Recalled)

Direct Examination (Resumed)

By Mr. E. B. Stanton:

The Court: All right, proceed.

Q. Mr. Berger, you testified, I believe, that your steps and procedure towards procurement of a license for export at that time were to first register your permits and contract, secondly, to make your application, and then you mentioned the payment of the tax. Following the communications that you sent to the Department on May the 30th did you thereafter pay the tax on any of these shipments?

A. No, sir; not until, finally, later in the year, but not at the time.

Q. I show you Plaintiff's Exhibit 5 and ask you if you have seen this document or a copy thereof before?

A. Yes, sir; I have seen it.

Q. When did you first see such a document?

A. Well, it reached us, I believe, in a letter dated June the 6th from Mr. Whipple, possibly June the 10th or 11th.

Q. I note in that "P.S." on this document:

(Testimony of G. Fred Berger.)

"Shipping schedule as follows," now quoting from the document: "June—50 tons; July—60 tons; August-September—200 tons; [199] September—150; October—275; November—200; December—200." Was there at any time any correspondence or agreement between you, Mr. Whipple, or Mr. Whipple and yourself and the Schenley Distillers pertaining to the time in the month of the June delivery?

Mr. Bronson: We will object to that. It calls for a conclusion. He is asking for an agreement, your Honor, as I understood it.

Mr. E. B. Stanton: Well, I will strike the word "agreement" and I will limit it merely to ask:

Q. Was there any correspondence or terms contained any place that you know of tying that down to the particular date in June when you were to make that delivery.

Mr. Bronson: The same objection, calls for a conclusion, incompetent and irrelevant.

The Court: If it merely directs attention to the existence or non-existence of the contract, I will allow the question.

Mr. E. B. Stanton: That is the purpose, your Honor.

The Court: Because, if the answer is in the affirmative, then it calls for the documents themselves; if it is a negative, it cannot be inquired into.

Mr. Bronson: The objection will be withdrawn, then.

(Testimony of G. Fred Berger.)

The Court: Beg pardon?

Mr. Bronson: For a yes or no answer. [200]

A. No.

Q. (By Mr. E. B. Stanton): You will note that that speaks of a matter of 50 tons for delivery in June. Did you acquire that 50 tons?

A. Yes, sir.

Q. About when?

A. Oh, quite early in June; I would say the first two or three days.

Q. After you received the merchandise did you at any time pay this tax for your export permit?

A. Well, I answered that just a little while ago by saying that we don't pay it until——

Q. Did you pay the tax in June?

A. No; we didn't pay it in June.

Q. You did not pay it until sometime later?

A. That is right; until sometime later in the year.

Q. Was there any reason you had for not paying your tax immediately?

Mr. Bronson: We will object to that as incompetent, irrelevant and immaterial. The fact is that he did not.

The Court: I think that depends on two things: One, on the question of law whether the requirement was to pay immediately; and second, if it is, whether there was any period of grace given for payment or a choice is given.

Mr. Bronson: May I interrupt a moment? [201]

(Testimony of G. Fred Berger.)

The Court: Yes.

Mr. Bronson: I think the witness testified this morning that you could pay at any time that you want to; that it was your initiative when you pay it. Was that correct?

The Witness: Yes, sir.

Mr. Bronson: So that testimony is in the record.

The Court: Read the question again.

Mr. Bronson: Before your Honor makes a ruling I would like to be heard. That may go to a very important point in this case, where the plaintiff has pleaded ready, willing and able to perform. There have been depositions taken that point toward a possible position that they were excused from non-performance; and it is our position here that they have to take one side or the other of that. Those are the decisions, I think. They can't take both sides at once; so just asking him for his reasons may raise that very point. I think that the fact of the matter is that he did not do it, and that would be all that is competent.

The Court: I do not think this is particularly a question of non-performance or a compliance of the requirement of a statute. The payment of a tax would not necessarily affect that. The nonpayment may have several consequences. I do not know. I have no Argentine law which has been called to my attention as to whether the effect of nonpayment [202] is to invalidate the license that

(Testimony of G. Fred Berger.)

has been issued, or whether the payment is a condition precedent upon the issuance.

Mr. Bronson: I believe, your Honor, is the latter point you have made; that he has testified that there is no license issued until you have paid the tax. He has also testified that you can pay your tax any time following the issuance of the permit.

The Court: Any time up to when?

Q. (By Mr. E. B. Stanton): Is there any limitation? A. No.

Q. As to the time after you file your permit as to when you can pay your tax?

A. There is no limitation. I testified this morning that after a certain length of time the Department might call you to point out that there is an application pending, but there is no limitation actually to the time at which you can pay the tax.

The Court: Do I gather, then, from what you say that once your application is pending, the permit will not be issued until the payment is made; is that true?

The Witness: That is correct, sir.

The Court: But then, once having application in, you can choose to delay payment until you are ready to use it, to use the permit, is that it?

The Witness: That is correct. [203]

The Court: I see, all right. I think in view of that I will allow the question, the pending question to be answered.

The Witness: May I have the question again?

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: Will the reporter read the question, please?

(Question read by the reporter.)

A. Yes, sir.

Q. What was that reason?

A. We did not receive the letter of credit, and when a letter of credit was pending we did not wish to add the cost of a tax to our other expenditures; so we delayed until we received the letter of credit.

Q. Did you ever receive this letter of credit from Schenley?      A. No, sir. [204]

Q. (By Mr. E. B. Stanton): Now, Mr. Berger, speaking of this tax, how much tax was involved that you are talking about, that you did not pay at that time?

A. Approximately 6,000 pesos, the equivalent of about \$1500 of American money.

Q. On the exchange of pesos, for the record, Mr. Berger, based on your experience as a banker and your familiarity with foreign exchange, can you tell us at this time what the exchange rate on a peso would be to the dollar as of May, 1946?

A. Well, it would be difficult to give you the exact fraction, but the peso is quoted in various classifications. The normal so-called free exchange, and that is what you and I would buy if we were going to the Argentine for travel purposes, is approximately at the rate of four pesos to \$1.00.

However, when it deals with imports, it depends a great deal on what is being imported. The Argen-



(Testimony of G. Fred Berger.)

tine Government controls its imports, not only by duties but also by classifying the imports under various classifications and applying different rates of exchange which are required in order to pick up the necessary dollars. Sometimes they are in favor, as is the case here, and sometimes they are not.

The rate on glucose at the time was at the rate of 3.3582.

Q. 3.3582? A. 3.3582, that is right. [205]

Q. You are sure of that figure, now?

A. 3.3582. May I look at a note? 3.3582 is correct.

Q. That is 3.3582 pesos to the dollar?

A. To the dollar, that is right.

Q. Referring again to this letter of May 23rd, signed by J. B. Donnelly, with a postscript on it—

Mr. Bronson: What is the exhibit number, please?

Mr. E. B. Stanton: Exhibit 5.

Q. Based upon the figure mentioned in this letter of 3.375 pesos per kilogram, have you computed the total consideration for this contract in pesos, based on 1135 tons mentioned in the letter?

A. Unfortunately, I haven't.

Mr. Bronson: I object to that, if your Honor please.

The Court: Just a minute.

Mr. Bronson: Let me ask counsel if I may have your Honor's permission: This is on your issue of damages? You are asking him, as I understood the question—I did not catch it definitely.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: I am asking him for the total consideration in dollars on what we calculate was the purchase contract.

Mr. Bronson: 1135 tons?

Mr. E. B. Stanton: Yes.

Mr. Bronson: Objection withdrawn. I did not understand [206] it.

The Witness: I have not calculated it. I have not made that calculation as yet.

Q. (By Mr. E. B. Stanton): Well, can you give us the basis for making the calculation?

A. The basis for making the calculation, in dollars, would be 1135 times 1375 pesos divided by the 3.3582, to provide the necessary dollars.

Q. Now, I note that there are certain specifications mentioned in this letter exhibit. Did you do anything about those specifications on the glucose which was eventually delivered to you?

A. Yes. Each delivery which was made was subjected to an analysis, a sample analysis taken by a separate company called the Control Co., which is an entirely independent company making a business of taking samples of various items that are to be examined and having those examined under their supervision, by a chemist or a laboratory, a certified laboratory under the Argentine general business rules.

Q. This company you mention——

A. The Control Co.

Q. ——they are independent of any individual brokerage house, then?

(Testimony of G. Fred Berger.)

A. Oh, yes, absolutely.

Q. Did you take this method to have your glucose [207] examined?

A. Each shipment—each consignment we took was subject to a special analysis.

Q. Showing you a letter dated May 31, 1946, I ask you if you can identify that? A. Yes, sir.

Q. What is it?

A. That is the report from the laboratory, a recognized laboratory, on a shipment of glucose to the extent of 50 tons.

Q. Does that have any bearing on your transaction at all?

A. Yes, that is the original 50 tons we purchased from "Intercont."

Mr. E. B. Stanton: I ask that this be introduced in evidence as plaintiff's exhibit next in order, with the Court to give us a translation of it.

The Clerk: Is this received, your Honor?

The Court: All right, it may be received.

The Clerk: It will be Plaintiff's Exhibit 26, in evidence.

The Court: This exhibit is on the stationery of Laboratorio Quimico Suizo Argentino, Established 1893; Dr. Juan Pelisch, Official Chemist of Argentine Industrial Union; address, Buenos Aires, No. 98.230, the 31st of May, [208] 1946.

Analysis of Liquid Glucose—

Sample produced by Engran S. R. Limited, San Martin 321.

165 casks of liquid glucose weighing 50.000 kilos net, stored at Catalinas Sud, galpon 18.—

(Testimony of G. Fred Berger.)

The Witness: That is Warehouse 18.

The Court: It is supposed to be a tier, because this is where they stored it. Warehouse. Well, all right. That is all right. That is excellent.

In Warehouse 18, Buenos Aires, May 27, 1946.

The seals are unbroken: Control Company, Limited, 48.—

Analysis:

Viscosity, 15 degrees Centigrade, 1.447—44°6 B'e.

I think that is Baume.

Sulfuric—now, off the record, I can't translate this.

Sulfurosox means sulfuric. I don't know what that "Anhidro" is.

Mr. Bronson: Anhydrid.

The Court: Sulfuric Anhydrid ( $\text{SO}_2$ ) 0.0027 and a percentage mark.

Color, crystal clear. It is in English, crystal clear.

Impurities, 0.01 per cent.

Heavy metals, none found. It says, "no tiene."

I presume that means it does not contain them.

And then it is signed Juan Peline. [208-A]

There are some pencil notations. Whose are those, at the bottom?

Mr. E. B. Stanton: Those are not offered, your Honor. If there are no objections, they are not offered in the exhibit.

The Court: All right. Then, the pencil notations are not part of the exhibit.

Q. (By Mr. E. B. Stanton): Now, Mr. Berger,

(Testimony of G. Fred Berger.)

based on the experience which you related to us this morning as a banker and one familiar with foreign exchange, you also stated you were familiar with the procedures in the matter of letters of credit; would you tell the Court, explain to the Court the normal procedure in procuring a letter of credit in the United States for transmittal or use in a foreign country?

Mr. Bronson: We are going to object to that. That is one of the issues in the case, and a normal situation would have no bearing on the issue in suit.

The Court: Read the question.

(Question read by reporter.)

Mr. E. B. Stanton: I will limit the "foreign countries" to the Argentine.

Mr. Bronson: Well, the same objection with the correction, your Honor, on the grounds stated. A letter of credit was mentioned, as your Honor knows—I think it is in Exhibit 5—a letter of Mr. Donnelly to send down there, and I think we [209] all know enough about those matters, to know that there are numerous kinds.

Mr. E. B. Stanton: Perhaps you will stipulate, Mr. Bronson, that Schenley could have procured the letter of credit within two or three days, had they desired to do so.

Mr. Bronson: Which letter of credit?

Mr. E. B. Stanton: The letter of credit which is in the contract.

Mr. Bronson: We will not stipulate to that.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: That is exactly what we got to do, in normal procedure. If a person desires to procure a letter of credit within normal procedure, they could do that within a matter of two or three days.

The Court: I don't think that is a matter of expert testimony. I think that involves a question of law and a question of fact. It is not the subject of expert testimony. Furthermore, I can't see that a Brazilian, a man who was in Brazil, could determine how long it would take for a corporation to secure a letter of credit who was in San Francisco.

Mr. E. B. Stanton: He stated, your Honor——

The Court: I know he has experience. That doesn't make him an international expert in the City of San Francisco. Each community has its own methods. The man has been away. I don't think you have lived in California, have you?

The Witness: No, sir. [210]

The Court: I don't see how he can tell how quickly a letter can be had.

Mr. E. B. Stanton: Well, there is testimony in the record——

The Court: If there is a reasonable time—if there is no time limit as to when the letter of credit is to follow, than it is for the Court to determine what is and what is not a reasonable time, and that is not a question which is a subject of expert testimony. Furthermore, as you know, Federal Courts do not favor expert testimony. As a matter of fact, we can allow it and then tell the Jury to dis-



(Testimony of G. Fred Berger.)

regard it and the court can disregard it and nobody can complain about it, and we allow it very, very rarely and only in those things about which the Court cannot know, and that is like medicine and the like, science and the light.

Mr. E. B. Stanton: The point here is, your Honor, that there are several written communications in here, of inquiry concerning the whereabouts of this letter of credit, of Mr. Whipple——

The Court: And you are also anticipating a matter of defense, which may not be necessary, that they are going to claim also reasons for the delay. You can wait until they do that. Then you can argue. But I think ultimately it is not a question of expert testimony. I mean the conditions under which you obtain a letter of credit would depend upon the [211] community.

Mr. E. B. Stanton: Of course, if the Court is going to consider whether or not they secured the letter of credit within a reasonable time, unless the Court has something before it as to what is reasonable time——

The Court: A question of reasonable time is for the Court to determine and not the person in Brazil. A letter of credit requires certain arrangements for deposit of funds. It is like getting a bond. It may take you time. If it is a large corporation, the mere fact that it is a large corporation does not mean that you can secure a bond very quickly. It all depends on what requirements the bonding company make.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: We have the correspondence which limits the matter to the Chase National Bank, or the bank at Boston, which I think ties the thing down a little more closely.

The Court: Then, it becomes a question of law. A letter of credit, if issued to any bank, is good anywhere. The mere fact that a person designates a certain particular bank does not bind anyone to do it. You may do it through another bank, because a letter of credit on any bank is good. Suppose you sent money abroad. I happen to know about that, because I send money constantly to Paris, for books in French and in other languages. So long as I send a draft in dollars, it does not make any difference whether I send it through Chase [212] National Bank or through the Bank of America. They have direct correspondents providing them with a letter of credit that is honored in that particular country. At any rate, it is a question of argument. It is not a question of expert testimony.

Mr. E. B. Stanton: I will withdraw that particular question.

Q. Mr. Berger, assuming that proper application for letter of credit were made to the Chase National Bank, assuming the funds being available, how long would it take Chase National Bank to issue its letter of credit and cause the same to be communicated to a principal in Argentine?

Mr. Bronson: The same objection on the same grounds.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: I feel that it is a different question, your Honor. We have the former suggestion that the time is up to the Court to determine, whether or not the Schenley Corporation waited a reasonable time to carry out the processing of their letter of credit, but this question is directed to the time, once the application has been made, as to how long it takes the bank——

The Court: He was never employed by the Chase National Bank. How can he tell?

Mr. E. B. Stanton: I think he has testified quite thoroughly as to his qualifications on foreign exchange.

The Court: I know, but a banker in Buffalo, New York [213] can't tell the practices of the Chas National Bank in New York City.

Mr. E. B. Stanton: He has testified, I think, that he had a number of years in New York as an employee of the bank examiner, and that would qualify him as to exchanges.

The Court: I can't see how he can tell how long it should have taken them.

Mr. E. B. Stanton: Perhaps I can qualify him further on the point, your Honor.

The Court: Well, go ahead, but I cannot see that anybody can testify to that, except an employee of the bank in charge of that particular department. I cannot see how a person—you might take the manager of the Bank of America across the street and he would not be qualified to say how long

(Testimony of G. Fred Berger.)

it would take the bank, the Chase National Bank. He might testify about how long it would take them. I can't see how anyone except an employee of a bank can state how long it would take.

Q. (By Mr. E. B. Stanton): Mr. Berger, have you had any experience in the banking business with the issuance of letters of credit?

A. Yes, sir.

Q. What banks?

A. At the Equitable Trust Company, which is now part of the Chase National Bank. [214]

Q. When was that?

A. In 1924, in 1923 and in 1922.

Q. Did you have any further experience, other than that, in the issuance of letters of credit, as a banker?

A. As a bank examiner, I have examined all of the phases of the matter for a period of ten years, mostly in foreign exchange, of course. [215]

Q. Now, specifically in reference to issuance of letters of credit?

A. That is correct.

Q. In the past four years that you have been in the import-export business have you procured letters of credit yourself from the bank?

A. Yes, sir.

Q. Have you had any experience with the two banks mentioned in this testimony?

Mr. Bronson: Which are those?

Mr. E. B. Stanton: Chase National Bank and the Bank of Boston.

(Testimony of G. Fred Berger.)

A. Well, the First National Bank of Boston in Buenos Aires, yes, definitely. They are our bankers.

Q. How long does it take you to procure a letter of credit from those banks?

Mr. Bronson: We will object to that, if your Honor please, as not the subject of expert testimony.

The Court: I will allow a general question to be asked. I think you are taking a good deal of time. I do not have to accept the showing of expert testimony if, in my opinion, I feel that it is not a matter which is universal so that you can tell what time it would take under all circumstances. I will overrule the objection and allow it to go in. [216]

Mr. E. B. Stanton: You may answer the question.

The Witness: Can I have the question read, please?

(Question read by the reporter.)

Mr. E. B. Stanton: Referring to the First National Bank of Boston and the Chase National Bank.

Mr. Bronson: That is a double question? Let us have them separately.

Mr. E. B. Stanton: Not referring to the Chase Bank.

A. Well, my reference cannot be to the Chase Bank because we do not deal directly with Chase, but we do deal with the First National Bank of Boston.

(Testimony of G. Fred Berger.)

Q. Limiting your answer to the First National Bank of Boston.

A. Referring to the First National Bank of Boston, it takes us about 15 minutes' conversation and then long enough for them to process the credit, which is possibly the rest of a business day.

Q. In any event not longer than two days in any one instance?

A. Oh, at the outside, two days.

Q. Prior to the first of June, 1946, did you have any direct correspondence with the Schenley Corporation?

A. Prior to June?

Q. Prior to June 1st. A. No, sir. [217]

Q. Subsequent to June 1st did you have any direct correspondence with the Schenley Corporation?

A. If cables are correspondence, the answer is yes.

Q. When?

A. I sent one cable on June 5th and another one June 7th or 8th.

Mr. E. B. Stanton: All right. Do you have the original of this cable of June the 5th? Let the record show counsel has stipulated to show the witness or to use a copy of the original cable which they acknowledge they have in their file.

Q. I will show you this copy of a cable on the All America Cable and Radio system, dated June the 5th, Buenos Aires, signed "Engraw" and ask you if you recognize that cable? A. Yes, sir.

Q. Is that the cable that you referred to when



(Testimony of G. Fred Berger.)

you stated that you communicated with Schenley by cable?

A. That is the first one; yes, sir.

Q. And the white slip, the white slip that is attached to it, what is that?

A. That is a notation from the All America notifying——

Mr. Bronson: It is a little hard to hear. I am sorry. Could I ask you to speak up?

A. I am sorry. Yes; that is a notation from the All [218] America, at my request to investigate the receipt of that cable by Schenley Distillers in Cincinnati, and they advise that it was received on the 6th day at 9:08 in the morning United States time.

Mr. E. B. Stanton: I ask that this be introduced into evidence as Plaintiff's next exhibit.

The Clerk: Is it admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 27 in evidence.

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### PLAINTIFF'S EXHIBIT 27

"All America Cables and Radio

NLT                      Buenos Aires, 5 de Junio de 1946  
Schenley Distillers  
Cincinnati Ohio

Acting good faith Whipl Losangeles confirmation letter your Sanfrancisco office have contracted for 1135 tons glucose under specification crystal-

(Testimony of G. Fred Berger.)

clear fortythree fortyfive degree baume USP stop  
To assure June delivery have purchased and paid  
for fifty tons laboratory test this lot density fifteen  
degrees Centigrad 1.447 dash 44 point 6 baume  
sotwo .0027% crystalclear laboratory reports no-  
calcium all deliveries subject same test to protect  
you all source same producer stop As credit was  
delayed obtained extension contracts because con-  
tractors satisfied Schenley purchaser now need  
credit immediately otherwise contracts will be can-  
celled with penalties stop For references Cain  
Chase National Chadsey First Boston wire credit  
thru First Boston here

ENGRAW

Cia Engraw Com. e Ind. S. A.

El Presidente'' [220]

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Q. (By Mr. E. B. Stanton): Did you receive  
an answer to this cable?

A. Not directly to that cable.

Q. What did you then do?

A. Sent another cable.

Q. When?

A. About the 7th or 8th of June. I don't remem-  
ber the exact date.

Mr. E. B. Stanton: You are familiar with this  
copy I am going to show him now, Mr. Bronson,  
of the 8th of June to Schenley Distillers. Will you  
stipulate that the copy of this original was re-  
ceived by you, is that right?

(Testimony of G. Fred Berger.)

Q. I will show you this cable bearing date June 8th, addressed "Schenley Distillers Cincinnati Ohio", signed "Berger Engraw" and ask you if you recognize that? A. Yes, sir.

Q. What is that?

A. That is the cable I sent to Schenley Distillers at Cincinnati on June 8th.

Mr. Bronson: Sent on June the 8th?

The Witness: Sent on June the 8th.

Q. (By Mr. E. B. Stanton): And the white slip attached to it is what?

A. And the white slip is an advice, an answer from All America Cables to my request for an investigation, advising [221] that the cable had been delivered on the 10th day of June at 9:00 o'clock in the morning United States time.

Mr. E. B. Stanton: I ask that this be introduced in evidence as Plaintiff's next.

The Court: It may be received.

Mr. Bronson: We will object to that, if your Honor please.

The Court: Oh, I beg pardon.

Mr. Bronson: Could we have your Honor withdraw that momentarily, please?

The Court: I will do that. I am sorry. I was a little too quick.

Mr. Bronson: We will object to it on the grounds it is incompetent, irrelevant and immaterial. It was after the notice that we would not make a contract with them.

(Testimony of G. Fred Berger.)

The Court: All right. Let us see it.

Mr. E. B. Stanton: I would like to be heard on that matter, your Honor.

The Court: All right.

Mr. E. B. Stanton: It is set forth in the pleadings the fact that there was a period of time during which negotiations took place between the plaintiff and the defendant regarding this alleged purchase of glucose. This is leading into the negotiations which took place, and the answer to this cable which will be our next offering, in [222] effect opened the negotiations with reference to the settlement of the matter which led actually to further damage of plaintiff, as alleged in the complaint, and opened the period of time lasting some four months during which time the Schenley Corporation was negotiating with the plaintiff concerning this purchase.

It is part of a chain of evidence which must be introduced. I think that cable should be taken into consideration with the reply to the cable.

Mr. Bronson: We might as well, if your Honor please, make our position plain here, that anything between these parties under the state the pleadings are in, anything that took place after the notice that Schenley gave that they did not intend to go through is beside the point. We take a position they can't blow hot and cold. If they are ready, able and willing, export licenses and all the considerations to go through, that is one thing; but if they could not fulfill their contract for any period of

(Testimony of G. Fred Berger.)

the serial deliveries, and seek to establish liability on the basis that their performance was excused, that is an alternative position that can't stand with the other one.

Mr. E. B. Stanton: There is no claim anywhere along the line, Mr. Bronson, that we could not fulfill our deliveries. We were ready, able and willing to fulfill our deliveries at all times and could deliver at any time. This [223] is the negotiation which took place here by Schenley which prevented us from acting.

Mr. Bronson: I then fail to see that this is within the purview of the pleadings at all.

The Court: There is this possibility: When a contract is repudiated it is the duty of the person, the beneficiary of the contract, to do all in his power to minimize the damage. If by reason of the attitude of the other party he is induced to delay any action leading toward minimizing of damage, then it becomes a material factor in the case.

I am making the statement in view of the statement of Mr. Stanton that there was a delay here in actually liquidating the purchasers that may have resulted in additional damages.

Mr. E. B. Stanton: That is essentially our position.

Mr. Bronson: That is not what they have pleaded here, your Honor. They stated that they were ready, willing and able at all times.

The Court: That is true so far as performance.

(Testimony of G. Fred Berger.)

Mr. Bronson: Yes.

The Court: Damages from the breach. This would have a bearing on damages, not on the contract itself. This is on the amount of damages. There was a case decided the other day by the Ninth Circuit where I had just the opposite situation. It is the case of Basich Company against some [224] insurance company—I forget which—and in that case it was one of those typical actions for the default of a subcontractor where the contractor sued the bonding company on the bond. And in that case the argument was made that the contractor acted too fast. He walked in and took charge of the work and completed it, and did not give the insurance company an opportunity to complete it.

I found that the letters were explicit enough to inform them of the default, and the fact that the subcontractor moved out of the job and it was up to them under the contract to go in, and having failed to do so, it was the duty of the contractor, in order to minimize the damage, to go on from there. The Circuit Court affirmed the position.

Mr. Bronson: That was on the point of mitigation.

The Court: Yes; just the reverse of this situation. Now, here, as I gather, they are going to argue that the damages were increased because they did not liquidate immediately, and the reason they did not liquidate was because of pour parler,



(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: From the standpoint of so long as we are talking foreign languages, that were going on, the discussions that were going on back and forth as to what was to be done in the matter.

Another reason why I think this cable is admissible is merely as a notice on the part of Engraw that they are not recognizing any repudiation of the contract but they are [225] insisting on its terms. To some extent it is——

Mr. Bronson: Self-serving. I wanted to say that.

The Court: ——a self-serving letter and Engraw is putting forth its best foot in giving its point of view. But aside from that, it is on the whole a notice that they are going to hold them to the contract to avoid any question as to whether there was acceptance or acquiescence in this repudiation of the contract, assuming that there was repudiation.

The objection is overruled. It may be received. Do you want this notice?

Mr. E. B. Stanton: Yes. I think that should be attached to the document.

The Court: Well, that notice is attached.

Mr. E. B. Stanton: From the standpoint of timing.

The Court: Was this sent to you with the copy of this copy you are filing and you merely attached it? This is the original from the company?

A. That is the one that came several days later.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: The defendants have admitted possession of the original that was received by them. However, they have stipulated that this copy may be used.

The Court: Well, this copy is merely a service message, entitled "Service Message" and was addressed in English. Then after giving the notice, refer to it as "NLT 62T8 Engraw [226] Comercial, etc., Buenos Aires. June 12 3:12 PM 46.

"We are informed from Cincinnati Ohio that your cable NR-218/8 NLT Schenley Distillers Cincinnati Ohio was delivered on the 10th around 9:00 o'clock AM."

And then greetings of All America Cable and Radio, Incorporated; and in the lower left-hand corner "57/MTO."

That may be received as one exhibit. I think I had better take this pin out so you attach that.

The Clerk: There is another one attached to the other cable. That is Exhibit 28. [227]

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### PLAINTIFF'S EXHIBIT 28

"All America Cables and Radio

June 8th, 1946

N. L. T.

Schenley Distillers

Cincinnati Ohio

You received ours giving specifications of contracts purchased for your account and laboratory test June shipment glucose stop We believe we are

(Testimony of G. Fred Berger.)

entitled courtesy cable reply stop We are not speculators and if you dont desire coverage will liquidate but if loss occurs must protect our interests stop If glucose desired please cable number letter credit socan proceed June shipment stop For personal reference Reuben Hays Firstnational Cincinnati

BERGER ENGRAW

CIA. ENGRAW COMERCIAL E IND. S. A.

G. Fred Berger,

President." [228]

Mr. E. B. Stanton: Did the court note there was a similar translation or a similar Spanish document attached to the previous exhibit?

The Court: No; I did not look at that.

Mr. E. B. Stanton: I am sorry.

The Court: All right; I am sorry.

The Witness: I translated it over here, your Honor.

The Court: You said it was a notice; I understand that. Well, I will read that one, Exhibit 27. It is a service message from "All America Cables and Radio" dated June 7 8:23 p.m. 46.

"Refer to NLT 69 T5, addressed to Cia Engraw.

"Referring to your cablegram No. 368/5 directed NLT Schenley Distillers Cincinnati Ohio we are informed by the office in Cincinnati Ohio that the above mentioned cablegram was delivered on the 6th at the hour of 9:08 United States time."

(Testimony of G. Fred Berger.)

Q. (By Mr. E. B. Stanton): Did you receive a reply to that last cable, Mr. Berger, that you sent to Schenley? A. Yes; I did.

Q. Approximately when, if you remember?

A. I am not quite certain. I think it must have been around the 12th of June.

Q. I show you this document purporting to be an original cable on the stationery of All America Cables and Radio, dated June the 12th and signed "Metcalf Distillers," [229] directed to Engraw and ask you if you recognize that? A. I do.

Q. What is that document?

A. This is the cable received from Mr. Metcalf in Schenley Distillers, dated June the 11th and received by us on June 12th.

Mr. E. B. Stanton: Will counsel stipulate that Mr. Metcalf is an employee, or was at that time an employee, of Schenley Distillers?

Mr. Bronson: Not in connection with this offer. We will make that stipulation as a matter of fact.

Mr. E. B. Stanton: I am only making the stipulation inasmuch as the signature on this wire is a little misleading. It says "Metcalf Distillers." Will you stipulate that this was sent by a Mr. Metcalf who was at that time in the employ of Schenley Distillers Corporation?

Mr. Bronson: Yes.

Mr. E. B. Stanton: I offer this into evidence now as Plaintiff's next in order.

Mr. Bronson: We will object to that, if your

(Testimony of G. Fred Berger.)

Honor please, upon the grounds it is incompetent, irrelevant and immaterial.

The Court: I will have to look at that.

Mr. Bronson: That is, we are making the same position as previously stated on the last preceding exhibit. [230]

The Court: I will admit it, limited to the purpose already indicated as to the other, as bearing upon any delay which might have increased damages. I am not admitting it as the basis of any negotiation that would validate the contract or admit of its existence, because negotiations, unless we are dealing with a ratification of a contract, which at the present time is not in question in view of the admission of authority—if there was a contract specific enough to be enforced, but limited to delay insofar as it may bear on enhanced damages, it will be received.

The Clerk: Plaintiff's Exhibit 29.

Mr. L. B. Stanton: That is the total purpose, your Honor, of all of this testimony.

The Court: I beg pardon?

Mr. L. B. Stanton: I say, that is the sole purpose of all of this testimony.

The Court: Well, all right. I am glad we are agreed.

Mr. L. B. Stanton: It is not directed to ratification at all.

The Court: All right.

The Clerk: Plaintiff's Exhibit 29 in evidence.

(Testimony of G. Fred Berger.)

(PLAINTIFF'S EXHIBIT 29 is in the following words and figures to-wit:)

All America Cables and Radio

NLL [231]

"BS66 New York 59 11

NLT Edgraw Commercial and Industrial SA San Martin 329 Baires

Replying your cable our negotiations have been carried on with Whipple Los Angeles who has been kept fully informed of our position regret exceedingly confused situation which has developed and suggest you advise me Schenley Newyork of extent of your uncancellable commitments also telephoning Whipple today

METCALF DISTILLERS"

The Court: What are we waiting for, gentlemen?

Mr. E. B. Stanton: I am waiting for a document to be produced, your Honor.

Mr. Bronson: Oh, here. I thought Mr. Rowe told you that you could go ahead and use it.

Q. (By Mr. E. B. Stanton): Did you reply to that last cable? A. Yes, sir.

Q. The one received, signed Metcalf Distillers?

A. Yes.

Q. I show you a cable on All America Cables and Radio, dated June 14th, 1946, signed "G. Fred Berger", addressed to "Schenley Distillers New York Ctiy" and ask if that is the reply that you made? [232] A. That is correct.



(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: Counsel, will you stipulate that the original of this wire was received by defendant corporation?

(Counsel conferring privately.)

Mr. E. B. Stanton: Will you so stipulate it?

Mr. Bronson: So stipulated. That is dated June 14th and received on the 15th.

Q. (By Mr. E. B. Stanton): What does "LC" mean on these cables?

A. That means the same as deferred cable in English.

Q. Like a night letter, for example?

A. No. NLT is night letter, and the reverse of a deferred cable down is LC up. It probably has some Spanish meaning that I do not know. That is what it means.

Mr. Bronson: We will concede that that is a day letter.

Mr. E. B. Stanton: We will ask this be received in evidence as the plaintiff's next exhibit in order.

Mr. Bronson: The same objection upon the same grounds, your Honor.

The Court: All right.

Mr. L. B. Stanton: We might stipulate, counsel, that your objection will go to all of this.

Mr. Bronson: I would like to get the court's consent on any understanding to any objections.

The Court: No; I don't like that. I have been a judge too long to like objections that are too general.

(Testimony of G. Fred Berger.)

Mr. Bronson: I don't mind, if your Honor can put up with it.

The Court: However, this series, I think it may be understood that this series of cables, gentlemen, is offered on the theory indicated by Mr. Louis Stanton and on which the court allows it, and that is that it bears upon delay as a basis for aggravation of damages, and as such will be received.

The Clerk: That is Plaintiff's Exhibit 30 in evidence.

(PLAINTIFF'S EXHIBIT 30 is in the words and figures as follows:)

“All America Cables and Radio, Inc.  
Sarmiento 500

L C

June 14th, 1946.

Schenley Distillers

Newyorkcity NY

Accordance your cable and to eliminate confusion are cabling Whipple extent uncanceledable commitments and amount liquidation damages

ENGRW

CIA. ENGRW COMERCIAL E IND. SA.

G. Fred Berger

President”

Q. (By Mr. E. B. Stanton): Following the sending of [234] that cable, Mr. Berger, did you hear anything further from the Schenley Corporation or any person representing to be from Schenley?

(Testimony of G. Fred Berger.)

A. We had a cable from Schenley advising us that a Mr. Dichter was going to call to see us.

Q. About when did you receive that?

A. Very close to the end of June.

Q. Do you recall who sent that cable to you?

A. Yes; Metcalf.

Q. In any event did Mr. Dichter so arrive?

A. Yes.

Q. And about when did Mr. Dichter arrive?

A. Either the 1st or 2nd of July, 1946.

Q. Where did you first see Mr. Dichter?

Mr. Bronson: Do I understand, your Honor—I want to be certain about it because we are anxious to protect ourselves in connection with this testimony—that on this particular phase of it a blanket objection will suffice? He is asking questions now and not showing documents.

The Court: All right, overruled. Go ahead.

(Question read by the reporter.)

A. I believe about the 4th of July, because on the 2nd of July, on Mr. Dichter's first visit to our office I was ill.

Q. (By Mr. E. B. Stanton): Now, you say about in [235] July. Prior to that time, prior to the first week in July, had you taken delivery of any more of this glucose from your suppliers?

A. If any—your question is: Prior to the first week in July had we taken delivery of glucose?

Q. Yes; from your suppliers?

A. I believe at that time we had two deliveries, one of 50 and one of 60 tons.

(Testimony of G. Fred Berger.)

Q. Will you relate now to the court in full, as best you can recall, the substance of your conversations with Mr. Dichter, taking them in chronological order?

A. Well, Mr. Dichter advised us at the time of his arrival that he was the party Schenley was sending down, which, of course, confirmed their original cable to us, stating at the same time that he had been sent down to look into the matter of the markets generally and as to our—the market generally as far as glucose was concerned, and also as to the status of our commitments. After a careful examination had been made into these, Mr. Dichter then suggested that there might be some program arranged so that this matter could be either liquidated or cancelled, and, as a result of several conversations we sent a joint telegram, approximately July the 8th, addressed to the Schenley Corporation, which telegram was signed by Engraw and by Dichter and by Berger individually. [236]

Mr. E. B. Stanton: Do you have that telegram?

Mr. Bronson: It is here.

Q. (By Mr. E. B. Stanton): I show you a copy of a cable on the All America Cables and Radio stationery dated Buenos Aires, July 8, 1946, addressed to Metcalf, signed Engraw-Dichter-Berger, and ask you if you recognize that?

A. Yes, sir; this is a copy.

Q. That is a copy of the cable which you just

(Testimony of G. Fred Berger.)

referred to in your testimony? A. Yes, sir.

Mr. E. B. Stanton: Will counsel stipulate that defendant received the original of the telegram that this copy purports to be?

Mr. Bronson: I am positive that that is the one. I am going to stipulate that we received that wire. Is that the 3-signature?

Mr. E. B. Stanton: That is Engraw-Dichter-Berger signature.

Mr. Bronson: What is the date of it?

Mr. E. B. Stanton: July 8th.

Mr. Bronson: Yes; we have that wire. [237]

Mr. E. B. Stanton: I offer this in evidence as Plaintiff's exhibit next in order.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 31 in evidence.

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### PLAINTIFF'S EXHIBIT 31

All America Cables and Radio

NLT

Buenos Aires, July 8, 1946

C. W. Metcalf

Schenley Distillers

New York NY

Cancellation here would cost approximately forty-fivethousand Dollars stop However opening of lettercredit would atonce eliminate penalty to extent of thirtythousand Dollars and would provide necessary time for orderly liquidation over contract

(Testimony of G. Fred Berger.)

period which is for balance 1946 stop Also sale over such extended period should further reduce probable loss if any to nominal amount therefore we suggest we act as your agents to liquidate contracts using our judgment as to manner of liquidation having in mind reduction of loss to minimum or entirely stop If agreed please advise so we can inform contractors and open letter credit thru First Boston these calculations dont cover Whipl will you deal with him directly

ENGRAW DICHTER BERGER''

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Mr. Bronson: Your Honor, I haven't checked them with the written documented evidence and I would like to have it understood it goes to that.

The Court: All right. Let me see it. May I see this?

Mr. Bronson: The same objection goes to the last offer.

Mr. E. B. Stanton: Have you that written memorandum?

Mr. Bronson: Do I have it?

Mr. E. B. Stanton: Yes. I have a photostatic copy.

Mr. Bronson: Let me see it.

The Court: All right, the objection is overruled. It is received. It is dealing with the same problem. As a matter of fact, that speaks of reducing the probable loss, so that without actually knowing what is coming, I anticipate the objection.



(Testimony of G. Fred Berger.)

Q. (By Mr. E. B. Stanton): Did you have any further communications with Schenley following that?

A. Yes. We had a three-way telephone conversation, Mr. Metcalf in New York and Mr. Dichter and I in my office in Buenos Aires.

Q. Will you relate the substance of that? Well, when [238] was that conversation?

A. I would say approximately July 15th.

Q. Prior to that time, did you have any further cable communications?

A. I don't remember any.

Q. Now, I show you a cable dated July 12th, on the Western Telegraph Company form, to Metcalf, signed Engraw, and ask you if that will refresh your memory.

A. Yes, but this was sent by us to Mr. Metcalf after that telephone conversation, because during the telephone conversation he questioned whether in the offer, included in the telegram, a full letter of credit should be necessary.

Q. Then this followed the telephone conversation? A. That is right.

Q. Now, basing your answer on the date of this telegram, would you care to revise your testimony as to the date of that conversation which I believe you said was the 15th?

A. Well, it had to be—it must have been earlier, for the simple reason that after we had this conversation, I checked with the suppliers and obtained from them the story that they would be willing, in

(Testimony of G. Fred Berger.)

this program, suggested program of liquidation, to act under the liquidation program with a 20 per cent letter of credit as the margin.

Q. Now, would you detail a little more fully for us the activities of yourself and Mr. Dichter which led up to [239] this telephone conversation?

Mr. Bronson: The same objection, plus the objection that it is a shotgun question, your Honor. It opens up everything.

Mr. E. B. Stanton: I had only reference to these negotiations.

The Court: No. With reference to these as he mentioned in the cable. Objection overruled.

The Witness: Will you state your question again, please?

Q. (By Mr. E. B. Stanton): Well, if you will detail, just give quite fully now all of the negotiations which you had with Mr. Dichter in Buenos Aires, concerning these glucose contracts.

A. After his arrival and after he had ascertained, on his own, the matter of the market and as to the extent of our commitments, then Mr. Dichter and I made visits to several of the suppliers, and particularly to the large one, S.I.F.A.R., in order to ascertain just exactly what arrangements could be made, either in regard to cancellation, if cancellation was to be arranged, or liquidation, and after we had had these interviews, then we compiled this cablegram of July 8th and sent it to Schenley Distillers.

(Testimony of G. Fred Berger.)

Q. And following that, what happened next in order?

A. And then after we had the telephone conversation——

Q. Now, this was after the—you mentioned you sent [240] the cable on July 8th. Now, what happened immediately after that? Did you receive a reply to that cable?

A. We had the telephone conversation.

Q. The telephone conversation followed the reply to the cable, then?      A. That is right.

Q. That is what I want to get at. Now, give us the substance of the telephone conversation?

A. The substance of the telephone conversation was two-fold. In the first place, in connection with liquidation, Mr. Metcalf raised the question that if they were going to liquidate—if we were going to liquidate for them, which is suggested in the cable, that they ought not to be put in a position where they would have to supply the whole amount, as a matter of letter of credit, and I went over to the suppliers with Dichter and they agreed that they would arrange to let us liquidate over the period with a 20 per cent of margin in letter of credit, and that resulted in that cable which I sent to Mr. Metcalf.

Mr. Bronson: I have to move to strike out the answer and all the various parts of it, if your Honor please, on the other ground and for the additional ground that it is purely conclusions of the

(Testimony of G. Fred Berger.)

witness. I was afraid of that when I said that it was too broad a question. He speaks of agreements and so on. [241]

The Court: Will you read the answer? Part of the statements are conclusions, and I think I will strike the answer and have the question read and ask the witness to confine himself to what was said and done, rather than talking about agreements, commitments and the like.

(*Question* read by the reporter.)

Mr. E. B. Stanton: That is referring to the conversation with Metcalf.

The Court: Well, tell us what was said. Put it in the form "He said" and "I said," the old fashioned American way, "Sez he" and "Sez I" is a very good way, the only way we can—we are fond of quoting another person—I think it is much superior to the quote and unquote affair which the radio has introduced. All right.

The Witness: Well, Mr. Metcalf referred to the cable we had sent him and raised the question as to, if there were to be liquidation, whether it would be fair to require the Schenley Corporation to file a letter of credit for the full amount required or to require them only to file for a reasonable margin of safety while the liquidation was under way. He also stated that insofar as the program outlined in our letter of July 8th was concerned, that it seemed quite satisfactory to him and authorized us to make

(Testimony of G. Fred Berger.)

contact with Dr. Goytia, and at which point, this being a three-way conversation, I directly interposed with the remark that I did not [242] know whether that would be in keeping, for Dr. Goytia was counsel for us, and Mr. Metcalf then advised that it was perfectly satisfactory from his point of view, because he thought we would have less difficulty in completing any arrangements if Dr. Goytia knew all about the program originally.

Q. (By Mr. E. B. Stanton): This Dr. Goytia that you refer to, who is he?

A. Dr. Goytia—there are two Doctors Goytia—this was Dr. Victor Daniel Goytia, of Goytia & Company, which at one time was the Argentine end of the firm of Momsen, Freeman and Goytia, Momsen being in Rio, Freeman in New York and Goytia in Argentina.

The Court: Are they a legal firm?

A. They are a legal firm, yes.

The Court: You called him a doctor. I thought so because you called him Doctor.

The Witness: That is a legal doctor.

The Court: Yes, I know. All right.

Q. (By Mr. E. B. Stanton): Is there anything further on the conversation?

A. Then I told Mr. Metcalf that we would check on the matter of letter of credit requirement and that we would then proceed to Dr. Goytia's office to complete what seemed to be an agreed arrangement.

Mr. Bronson: Now, I ask that the last expres-

(Testimony of G. Fred Berger.)

sion "what seemed to be an agreed arrangement" be stricken.

The Court: Yes. That may be stricken.

Mr. E. B. Stanton: Well, that is what Mr. Berger said on the telephone.

Mr. Bronson: You are suggesting something, Counsel.

The Court: Let the answer be stricken. If he wants to add something to it, he may do so.

Q. (By Mr E. B. Stanton): What happened following this telephone conversation relating to this glucose matter?

A. We did two things. We discussed the matter with the suppliers who agreed that if liquidation was to be arranged, they would take 20 per cent letter of credit and that resulted in the wire which was just identified.

Mr. E. B. Stanton: I now ask that this wire dated July 12th to Metcalf, signed Engraw, on the stationary of Western Telegraph Company, Limited, be introduced in evidence.

Mr. Bronson: The same objection.

Mr. E. B. Stanton: And I will ask you to stipulate that the original of this wire was received by him with a copy.

Mr. Bronson: I can't tell you that until I look through these.

The Court: All right.

Mr. E. B. Stanton: Counsel has suggested that I put [244] this in evidence, now, subject to their



(Testimony of G. Fred Berger.)

checking for the original which may be substituted in place of this copy.

The Court: All right. It may be received.

The Clerk: Admitted as Plaintiff's Exhibit No. 32, in evidence.

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PLAINTIFF'S EXHIBIT NO. 32

The Western Telegraph Company Limited

July 12th, 1946

LC

Metcalf

Schenley Distillers

New York NY

Twentypercent lettercredit margin acceptable for liquidation program

Engraw''

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The Court: I think the witness would appreciate a recess, so we will give him a recess now.

(Whereupon a short recess was taken.)

Mr. E. B. Stanton: Mr. Reporter, will you read the last question and answer?

(Record read by reporter.)

Q. Now, what was the next thing that took place?

A. Well, the next thing was that we followed Mr. Metcalf's direction and went to see Dr. Goytia and discussed the matter further with him.

(Testimony of G. Fred Berger.)

Q. Did anything happen as a result of your conference with Dr. Goytia?

A. Yes. There was an interchange of cables, then, between the office of Dr. Goytia and the office of Momsen, of Momsen and Freeman in New York, and after that interchange, Mr. Dichter was instructed to go up to Brazil again to finish some work that he had left there rather hurriedly when he came down originally, and Mr. Dichter then returned about the 31st of July.

Q. And when he returned, what happened?

A. We then visited Dr. Goytia's office again and he had had a further interchange of cables and apparently nothing was to be done at the moment.

Q. These cables that you are speaking of in this period of sequence are all between Dr. Goytia's office and Momsen?

A. Dr. Goytia's and Momsen in Momsen's office in New York City, that is right.

Q. You are speaking of that interchange of your own knowledge, are you?

A. Oh, yes. I saw the cables, but we do not have them.

Q. What followed after that?

A. Well, when Mr. Dichter came back on the 31st of July, he was leaving a couple of days later, we discussed more or less, then, in general the entire matter of our contact and then we agreed that we had better write a memorandum of the visit, the whole visit, so as to bring it down into writing as to what had been done.

(Testimony of G. Fred Berger.)

Q. You say you and Dichter agreed to write a memorandum?           A. That is right.

Q. Did you write this memorandum?

A. I wrote it, mostly in rough, and then Mr. Dichter and I went over it and then I had it written finally and gave him several copies of it to take with him.

Q. I show you what purports to be a copy on the stationery of Cia Engraw, interoffice communication from G. Fred Berger to Mr. E. R. Dichter at Buenos Aires, August 2nd, 1946, consisting of some five pages, and ask you if you can identify this?

A. Yes. That is a copy of the original memorandum that I gave Mr. Dichter.

Q. And this memorandum covers the period of time that Mr. Dichter was there and what you had accomplished?

A. Well, I think it covers more than that. It covers more or less the history of the program down to date.

Mr. Bronson: Well, the document speaks for itself, your Honor, and I object to it.

Mr. E. B. Stanton: Will counsel stipulate that the original of this memorandum is attached to one of the depositions, I think it is the Heymsfeld deposition, and that this copy may be used in lieu of the original at this time?

Mr. Bronson: I can't stipulate that it can be used. I agree that our file shows that it was an exhibit, taking No. 64-N in Mr. Heymsfeld's deposition taken by you.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: Well, you have no objection to my offering the carbon rather than the original?

Mr. Bronson: No. That may be done.

Mr. E. B. Stanton: I now offer this in evidence.

Mr. Bronson: We object to it on the ground that it is incompetent, irrelevant and immaterial, that it is self [247] serving and that it is conclusions. It meets many objections, your Honor.

The Court: I will have to read it. It is rather long. I don't know whether that is covered.

(A short intermission followed.)

The Court: I think this goes outside of the scope of the telegrams. This is a brief for the plaintiff, very ably written by whoever wrote it.

The Witness: Thank you.

The Court: It is clearly an argument as to why his position is correct. I can't see that it has any bearing, a mere fact he said he gave it to Dichter. Dichter did not approve it.

Mr. E. B. Stanton: Perhaps I might ask you a couple of more questions before your Honor rules on the admission of the document.

The Court: On its face, it says from Mr. Berger to Mr. Dichter. It is a memorandum given to him, occupying his position. It is not an agreement or a statement or an approval of anything of Dichter, in any capacity. It is merely a statement of the company's position and an argument as to why they have a contract and they expect to be made whole for any loss they have had.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: May it be marked for identification?

The Court: It may be marked for identification, only. [248]

The Clerk: Plaintiff's Exhibit 33, marked for identification only.

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### PLAINTIFF'S EXHIBIT NO. 33

Compania Engraw

Comercial E Industrial S. A.

Buenos Aires, Argentina

Beunos Aires, August 2nd, 1946

Inter-Office Communication

From Mr. G. Fred Berger

To Mr. E. R. Dichter.

Subject: Glucose Contracts.

After numerous cables during April and May covering the subject of the sale of glucose thru Mr. Whipple in Los Angeles, we finally received a telegram under date of May 20th accepting for parties then unknown to us, an offer for 1300 tons which we had made on April 24th and May 9th.

We immediately replied advising Whipple that it was impossible to hold offers firm in a market for glucose such as this has been.

On May 21st, we advised Whipple by L.C. that we had available, subject to prior sale, 600 tons at Arg. Pesos \$1.30 per kilo and outlined conditions of payment which included 25% deposit in cash and advised him also that we would endeavor to

(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

secure an additional amount up to the 1300 tons if he confirmed the price offered in this telegram, i.e. A.P. \$1.30.

On the 22nd of May, we received a telegram from Mr. Whipple, accepting the 600 tons at \$1.30 and offering to accept the balance of the 1300 tons at the same price. In this cable he also advised us that Schenley was the purchaser and would open credit for the entire amount but without a cash deposit which has been requested in our telegram of May 21st, according to the requirement of the supplier.

Under the circumstances and knowing that Schenley was the purchaser, we took the steps necessary to obtain as much of the balance at the same price as possible (our price being \$1.20 F.A.S. and our offer thru Whipple being at \$1.30 F.O.B. so that we had a F.A.S. F.O.B. cost of approximately five centavos, leaving a net to us of five centavos on our F.O.B. offer of \$1.30, subject of course, to special storage charges if deliveries did not coincide with steamer availability) and the suppliers now knowing Schenley as the purchaser dropped the requirement for a cash deposit requiring only the normal opening of the letter of credit.

Under date of May 22nd, we sent an N.L.T. advising Mr. Whipple that we had made the necessary arrangements for 1135 tons to be shipped as follows:



(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

June .....	50 tons
July .....	60 tons
August-September .....	200 tons
September .....	150 tons
October .....	275 tons
November .....	200 tons
December .....	200 tons

Contracts to cover this, were signed as follows:

600 tons .....	May 23rd
60 tons .....	May 22nd
200 tons .....	May 23rd
75 tons .....	May 24th
150 tons .....	May 22nd
50 tons .....	May 27th

Under date of May 23rd, 1946, your Mr. J. B. Donnelly at your San Francisco office, wrote to Whipple starting his letter "this letter will confirm our telephone conversation and your letter of May 21st" the acceptance being the original 600 tons mentioned earlier in this letter. However, as a P.S. to this letter, Mr. Donnelly added "since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial e Industrial S.A. of 1135 tons with a shipping schedule as follows"; this shipping schedule is the same as we outlined in our telegram of May 22nd so that undoubtedly the body of his letter was dictated some time earlier than the P.S. tho the entire letter was dated May 23rd.

(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

I have mentioned these dates for the simple reason that apparently there seems to be some doubt expressed as to the order in which these contracts were made. We closed them after receiving Whipple's instructions that the sale had been made to Schenley and our advice to Mr. Whipple under date of May 22nd, via N.L.T. so stated, "acting on your cable 21st, have completed firm purchases for account Schenley Distilleries 1135 tons stop" and then we added the shipping schedule which Mr. Whipple must have received under under date of May 23rd.

Mr. Donnelly confirms the acceptance of this offer, his letter being dated May 23rd but please not that Mr. Donnelly's letter of May 23rd confirms a telephone conversation and also Mr. Whipple's letter of May 21st. Mr. Whipple wired us on the 21st, via night letter, which we received the morning of the 22nd, advising us of the approval of the purchase of the entire amount up to 1300 tons and that Schenley would open their credit for the entire amount.

Accordingly, the question of the timing and dating of contracts appears to be one of whether or not there is good faith all around.

It is obvious that we acted in the completion of these contracts only on the strength of our dependence on the fact that this purchase was being made for Schenley of whose credit I am fully familiar as a former banker.

(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

Without attempting to enter into a controversy it would seem that if the present opinion is that we purchased without authority from Schenley, then it seems only fair to point out that in Mr. Donnelly's letter to Mr. Whipple, he in turn, in his P.S., acknowledged and accepted "the offer of Cia. Engraw Comercial e Industrial S.A. of 1135 tons with a shipping schedule as follows" that shipping schedule having been sent by us to Whipple in our N.L.T. of May 22nd so that obviously there was an offer and an acceptance if there was no purchase for account of Schenley.

Under date of June 4th, we received the first telegram from Whipple advising us that apparently something had gone amiss with the contracts, the objection at that time seeming to be based on a required analysis of the glucose.

We immediately advised Whipple of the analysis of the purchase we had made and also advised that our purchase had been made within the requirement of 43-45 Baume U.S.P.

Then, on the 5th of June, I wired Schenley at Cincinnati (Mr. Whipple's wire noted Cincinnati headquarters were refusing to authorize the credit) quoting to them the purchases we have made and the analysis of the test of the spot purchase we had already made in order to be certain to cover their requirements advising them at the same time that each delivery would be subject to a similar test for their protection.

(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

Under date of June 6th, Mr. Wjipple advised us that he had obtained a part of an earlier sample we had sent him and forwarded this to the Schenley Laboratory in Chicago.

Under date of June 8th, I sent a second wire to Cincinnati asking for a reply and under date of June 12th, we received an N.L.T. from Mr. Metcalf regretting the confused situation which had developed and suggesting that we advise him at New York of the extent of the uncancellable commitments.

After the exchange of various telegrams under date of June 14th, I wired Schenley of New York that in order to eliminate further confusion, we were cabling Whipple the extent of uncancellable commitments and the amount of liquidation damages, having ascertained at this time that we could cancel the largest contract for a ten centavos per kilo payment.

Mr. Dichter then reached Buenos Aires and made contact with us and as a result, we sent a joint cable to Mr. Metcalf under date of July 8th, outlining in effect that it would cost approximately U\$S 45,000.—to cancel but that if a letter of credit was opened (a 20% requirement of the total was later arranged) the cancellation penalty of U\$S 30,000.00 would be eliminated and this action would also provide the time for orderly liquidation over the contract period which is the balance of 1946.

(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

We also expressed our belief that there need be no loss in connection with the balance of the contract for if we act as the agent for Schenley to liquidate the contracts, we believe that unless something untoward and drastic were to happen, we should be able liquidate the contracts without loss to any one.

We also took up the matter by cable with Mr. Whipple in order to ascertain the minimum amount of commission for which he would settle and he has left the matter in our hands.

Later telephone conversations with Mr. Metcalf disclosed that apparently he was satisfied to leave the further decision in connection with liquidation or cancellation in our hands together with Dr. Victor Goytia, the Argentine member of the firm Monsen, Freeman and Goytia.

We discussed this matter with Dr. Goytia who exchanged cables with his New York office but during Mr. Metcalf's absence, apparently the legal department chose to take a stand different than that taken by Mr. Metcalf and the situation then became complicated.

As of the end of July, it became necessary for us to assume that Schenley would wish to liquidate (which liquidation Messrs. Dichter, Goytia and Berger had jointly recommended) and in order not to be in violation of the contracts we had entered into for account of Schenley, we picked up a further 160 tons of glucose so that we now have



(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

approximately Arg. Pesos \$250,000. of our funds involved without requiring any advances up to this time.

But the major contractor is now pushing us for a decision as to whether we are cancelling or liquidating (and he is in a position to do so for there has been not deposited the required Schenley credit for 20% of the total contract) and it will be necessary for us to give him an answer shortly.

We personally cannot cancel without violating the contracts into which we entered for account of Schenley, and if we violate them they having been registered with the Chamber of Commerce, we might just as well go out of business.

On the other hand, based on our funds already involved in taking up the July commitments (and there are 300 tons available in August) we are not in a position to go forward without a complete agreement with Schenley either to liquidate or to cancel.

To summarize, on the receipt of knowledge that the purchaser of the glucose in question was Schenley, we were able to eliminate the requirements for a cash deposit and were able to complete arrangements for the purchase of 1135 tons on a delivery schedule outlined in our N.L.T. of May 22nd which Mr. Whipple must have relayed to Mr. Donnelly who acknowledge and confirmed Schenley's acceptance of our offer, including in his acknowledgment



(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

the schedule of shipments which is the same schedule we outlined in our N.L.T. of the night before.

Therefore, if it were to be a question of whether or not we purchased before Schenley confirmed (and this we did not do until we knew that Schenley was the purchaser) the offsetting question seems to be that the information we outlined in our N.L.T. of May 22nd had definitely to be relayed by Mr. Whipple to Mr. Donnelly or he would not have been in a position to acknowledge and confirm the purchases and to further outline the shipping schedules which were for the first time mentioned in our N.L.T. of May 22nd.

So, it would seem that we either purchased for account of Schenley or Schenley's representative completed an acceptance of our officer—it does not seem possible that both actions can be contended.

Assuming for the sake of this memorandum, that Schenley admits either legal or moral responsibility, then the joint recommendation of Messrs. Goytia, Dichter and the writer is that we liquidate the contracts to eliminate both the cancellation cost and any possible reflection on either Schenley or Engraw for not fulfilling the contract, in addition to which it is our belief that the liquidation can in all probability be arranged without loss to any one.

Messrs. Goytia, Dichter and Berger feel that if an allowance for Whipple were made to the extent of U\$5,000—plus U\$S500.—cost, this would be entirely satisfactory to Whipple.

(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

To further summarize, the cable which Messrs. Dichter and Berger sent to Mr. Metcalf under date of July 8th and added to it our suggested settlement for Whipple, the summarization would be as follows:

Local cost of cancellation as outlined in	
the telegram .....	U\$S 45,000
Whipple's commission and expense	
allowance .....	" 5,500

---

Total cost if cancellation is car-	
ried out .....	U\$S 50,500
If recommended liquidation is carried	
out immediately, the need for pay-	
ment of the cancellation fee is elimi-	
nated which reduces the cost by....	U\$S 30,000

---

Net cost assuming that the contracts	
cannot be liquidated at better than	
1.20 .....	" 20,500

---

In view of the fact that the government just at this time has been delaying the issuance of export permits in its fight to reduce the local cost of living, there has been practically no activity in the glucose market which has remained steady at 1.23/1.25 but we already have information from our broker of a large offer pending from the United

(Testimony of G. Fred Berger.)

Plaintiff's Exhibit No. 33—(Continued)

States at 1:31 just as soon as export licenses are granted.

So, if it were not for this delay in the issuance of the export permits I believe we could continue liquidation if we had nothing more than the 20% letter of credit pledged to meet the contract requirement with the main supplier.

It is estimated that the export licenses should be coming thru shortly and under the circumstances we cannot help but feel that the major portion, if not all of the U\$S 20,500. shown above as the net cost of liquidation will disappear as contracts are liquidated between now and the end of the contract period which is December 31, 1946.

Accordingly, we are most hopeful that Mr. Metcalf will agree to the suggested program of liquidation and will therefore arrange to have the letter of credit deposited and authorize us to proceed with the liquidation taking such steps as may be necessary to carry it thru successfully in accordance with the program already outlined by Messrs. Goytia, Dichter and Berger.

CIA ENGRAW COMERCIAL E  
INDUSTRIAL S.A.

/s/ G. FRED BERGER,  
President.

GHB:MBF

---

Q. (By Mr. E. B. Stanton): Following that

(Testimony of G. Fred Berger.)

memorandum, then, did Mr. Dichter leave South America?

A. Mr. Dichter returned to the United States.

Q. And do you have any further communication from Mr. Dichter or anyone else in the Schenley organization?

A. Before Mr. Dichter left and after we had read and approved that memorandum——

Mr. Bronson: Just a moment. [249]

Mr. E. B. Stanton: Answer that yes or no.

The Witness: Oh, excuse me.

Mr. E. B. Stanton: Just answer the question yes or no.

The Witness: I would like the question again, then.

Mr. Bronson: May the answer be stricken out? We could not hear it here, anyway.

The Court: Yes; it may be stricken.

(Question read by the reporter.)

A. Yes.

Q. (By Mr. E. B. Stanton): What was that?

A. I received a cable from Mr. Dichter about September 8th from Milwaukee in answer to one I sent him asking as to what was the result of his visit, his visit after his return to New York, and what the final decision was, what was the final decision.

Q. I note you mentioned a date in your testimony as September 8th. I show you this telegram, copy of a telegram dated August 8th on the stationery of the Western Telegraph Company, to Emmanuel Dichter, signed Berger.

(Testimony of G. Fred Berger.)

A. I am sorry. August the 8th, of course, is the date, because Mr. Dichter left for the States on August the 2nd.

Q. Is that the wire that you are referring to which you sent? [250]

A. That is right.

Mr. E. B. Stanton: I ask that this be introduced in evidence as Plaintiff's next in order. The original of this wire, I believe, is in the Heymsfeld deposition. Will you stipulate that this wire was received by the Schenley Company?

Mr. Bronson: Yes.

Mr. E. B. Stanton: I will offer this copy in evidence.

Mr. Bronson: The same objection on the same grounds.

The Court: This group goes along with the others. Overruled.

The Clerk: Plaintiff's Exhibit 34 in evidence.

---

#### PLAINTIFF'S EXHIBIT 34

Reads in words and figures as follows, to wit:

"The Western Telegraph Company Limited

August 8th, 1946

L. C.

Emmanuel Dichter

150 Bennett Avenue

New York NY

Important please cable decision or status regards.

BERGER.

(Testimony of G. Fred Berger.)

CIA. Engraw Commercial E Ind. S. A.”

Q. (By Mr. E. B. Stanton): Did you receive a reply to that cable?

A. Yes; I received a reply from Mr. Dichter.

Q. I show you this cable bearing date of receipt August 10th, addressed Berger, signed Dichter from Milwaukee, and ask if you recognize that?

A. I do.

Q. Is that the cable you received in reply?

A. It is.

Mr. E. B. Stanton: I now offer this in evidence as plaintiff's next exhibit in order.

Mr. Bronson: The same objection upon the same grounds.

The Court: The same or similar type. Overruled.

The Clerk: Plaintiff's Exhibit 35 in evidence.

---

#### PLAINTIFF'S EXHIBIT 35

Reads in words and figures as follows, to wit:

“The Western Telegraph Company, Limited

No. 00687

Telegrama

DLH38/10 WU Milwaukee Wis 12 10

LC Berger F-5 Edificio Kavanaugh Baires

Legal department will inform promptly.

DICTER.”



(Testimony of G. Fred Berger.)

Q. (By Mr. E. B. Stanton): Did you receive any further replies or answer from or communications from Schenley? A. No, sir.

Q. What was the next contact, if any, that you had with Schenley Distillers? [252]

A. I left the Argentine on August the 24th and Brazil on August the 31st, reaching New York on September the 1st. I had a meeting with Mr. Hosey and Mr. McManus, who are connected with our organization in the states, and our meeting was with Mr. Heymsfeld, who I understand is general counsel of the Schenley Corporation, in the offices of the Schenley Corporation in the Empire State Building on September the 4th.

Q. What occurred at that conference?

A. We discussed various matters and, as a result, Mr. Heymsfeld advised us that Schenley had no further intention of going through with any arrangement or any discussion we had had with Mr. Dichter during his visit, and, insofar as the contract was concerned nothing was to be done about it.

Q. Anything further at that conference that you can recall?

A. Well, there was supposed to be a further conference, I believe about September 15th, which conference was not held.

Q. Were any sums discussed, any amounts?

A. We outlined in a general way what was——

Mr. Bronson: I think we will object specially, if your Honor please.

(Testimony of G. Fred Berger.)

The Court: Objection sustained. [253]

Q. (By Mr. E. B. Stanton): Did you have any further communications with Schenley Corporation?

A. Under date of September 18th, I believe, I wrote them a letter.

Mr. E. B. Stanton: Do you have the original of this letter?

Mr. Bronson: Exhibit B, is that what you are talking about?

Mr. E. B. Stanton: Yes.

Q. I show you a carbon of a letter dated September 18, 1946, to Ralph Heymsfeld, signed "G. Fred Berger." Can you identify that copy?

A. Yes, sir; that is the copy.

Q. That is the copy of the letter which you——

A. Of a letter which I mailed to Ralph Heymsfeld, Esq. under registered mail on September 18, 1946.

Mr. E. B. Stanton: Counsel, will you stipulate that this letter was received by Ralph Heymsfeld?

(Counsel conferring.)

Mr. Bronson: I am asking you if you do not have a reply?

Mr. E. B. Stanton: I have a reply.

Mr. Bronson: Are you going to use it?

Mr. E. B. Stanton: Yes. Will you stipulate I may use the carbon in lieu of the original? [254]

Mr. Bronson: I beg pardon?

Mr. E. B. Stanton: The original is attached to the Heymsfeld deposition.

(Testimony of G. Fred Berger.)

Mr. Bronson: Yes; I so understand, and you may use the carbon in lieu of the original. I am objecting to the admission of the document on the same grounds heretofore stated for the bulk of these documents put in by the witness Mr. Berger, and on the additional ground it adds nothing to what took place on June 6, 1946.

The Court: All right, the objection will be overruled. This is along the same line.

Q. (By Mr. E. B. Stanton): Did you receive a reply to that letter?

The Clerk: Plaintiff's Exhibit 36 in evidence.

---

### PLAINTIFF'S EXHIBIT 36

Reads in words and figures as follows, to wit:

“September 18, 1946

Ralph Heymsfeld, Esq.  
Schenley Distillers Corp.  
350 Fifth Avenue  
New York 1, New York

Dear Sir:

This is to notify you that the suppliers with whom we contracted for the 1135 tons of glucose which we brought for your Company have finally refused to accept cancellation of the contracts. We are, therefore, proceeding to sell the glucose at best prices obtainable and will, of course, look to you for payment to us of the difference between the

(Testimony of G. Fred Berger.)

prices thus obtained and the price at which you contracted to purchase the same.

“Very truly yours,

COMPANIA ENGRAW COMMERCIAL E INDUSTRIAL S. A.

(initialed) G. FRED BERGER,  
President.

“GFB-gem

“Registered Mail.”

---

Q. (By Mr. E. B. Stanton): Did you receive a reply to that letter?

A. Yes, sir; I did.

Q. I show you a letter on the letterhead of Schenley Distillers Corporation, dated September 20, 1946, signed “Ralph T. Heymsfeld,” addressed to Compania Engraw. Do you recognize that?

A. Yes; I do.

Q. Is that the reply that you received?

A. It is.

Mr. E. B. Stanton: I offer this next in evidence.

Mr. Bronson: Is that an exhibit in Mr. Heymsfeld’s deposition?

Mr. E. B. Stanton: That is the original letter from [256] Mr. Heymsfeld.

The Court: Overruled. It may be received.

The Clerk: Plaintiff’s Exhibit 37 in evidence.

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT 37

Reads in words and figures as follows, to wit:

“Schenley Distillers Corporation  
Empire State Building  
350 Fifth Avenue  
New York 1, N. Y.

September 20, 1946

“Compania Engraw  
Comercial E Industrial S.A.  
San Martin 329  
Buenos Aires  
R. Argentina

Dear Sirs:

Your letter of September eighteenth has been received and in reply we beg to advise that the statement in your letter that you bought glucose for our Company is incorrect and that, as you have been previously and repeatedly advised, we have no obligation to you in the matter.

“Yours very truly,  
SCHENLEY DISTILLERS  
CORPORATION,

/s/ RALPH T. HEYMSFELD

CC Mr. G. Fred Berger  
Room 1807  
Hotel New Yorker  
New York, N. Y.”

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: Now, at this point I would like to offer into evidence an Inter-Office Communication dated July 12, 1946, which happens to be Plaintiff's Exhibit 39-N attached to the deposition of Mr. Heymsfeld, the genuineness of which has been admitted by the defendant, an inter-office communication signed C. W. Metcalf, dated July 12, 1946.

Mr. Bronson: We make the same objection as we do to all of the documents in this chapter of the proceedings.

The Court: All right.

Mr. Bronson: Do you want to show that to the court at this time?

Mr. E. B. Stanton: Yes. I will have to take this exhibit apart here.

Mr. Bronson: He wants to read it to be following it properly.

The Court: Have those depositions been filed?

Mr. L. B. Stanton: They are in the file but I do not think they have been offered into evidence.

The Court: In that case you do not need to tear that apart. We can take them by reference.

Mr. E. B. Stanton: I have a copy here, your Honor.

The Court: A loose copy?

Mr. E. B. Stanton: Yes.

The Court: All right. [258]

Mr. E. B. Stanton: I will show you the copy, your Honor, and then that is my only copy, but we can use the one from the deposition.



(Testimony of G. Fred Berger.)

The Court: You can take it by reference.

Mr. E. B. Stanton: Will that be read into the record, then, your Honor? That is the only copy I have.

The Court: Isn't there another copy attached?

Mr. E. B. Stanton: There is a copy attached to the deposition.

The Court: All right. Then where is the deposition?

Mr. E. B. Stanton: The court must have it in the file of the court.

The Court: We can receive it by reference. You do not need to read it into the record. All the depositions are in the hands of the clerk. Which deposition is it, Heymsfeld?

Mr. L. B. Stanton: It has the number on it. It has the number right on there.

Mr. Bronson: Yes; it is here.

The Court: What is the number of it?

Mr. Bronson: 39-N. They are in order chronologically.

The Court: Where is the number marked on it?

Mr. Bronson: I think they are on the exhibit.

The Court: The white sheet?

Mr. Bronson: No. I think it is on the other part, [259] isn't it? They are marked right on the exhibits.

Mr. L. B. Stanton: They are marked right on here, your Honor. Your Honor will see right there.

The Court: Oh, yes.

(Testimony of G. Fred Berger.)

Mr. Bronson: Can I pass those now to the reporter to be copied?

The Court: Yes. Inter-Office Communication dated July 12, 1946, signed by "C. W. Metcalf," and which is Plaintiff's Exhibit 39-N to the deposition of Mr. Heymsfeld will be received in evidence and marked Plaintiff's Exhibit——

The Clerk: 38.

The Court: 38 in evidence.

Mr. Bronson: That will be copied into this record, I take it?

The Court: Oh, yes; transcribed into the record. That is right.

---

### PLAINTIFF'S EXHIBIT 38

Reads in words and figures as follows, to wit:

"Inter-Office Communication

July 12, 1946

I talked to Messers. Berger and Dichter regarding the Engraw glucose matter. I told Mr. Berger that we had retained Monsen & Freeman of New York to represent us in settling this matter and that Dr. Victor Goytia, [260] 501 Avenida Rogue, Saenz Pena, Buenos Aires, was the Argentina representative of Monsen & Freeman and that they were to get in touch with Dr. Goytia in relation to this matter.

"Berger told me that he was very well acquainted with Dr. Victor Goytia and that, as a matter of fact, he had done legal work for Engraw and was

(Testimony of G. Fred Berger.)

thoroughly familiar with the glucose situation so that he would not anticipate any difficulty in working this out with Dr. Goytia.

“C. W. METCALF.

CWM:MRT”

---

Mr. E. B. Stanton: I will make the same offer on Exhibit 55-N from the deposition, memorandum from Metcalf referring to a conversation with Mr. Dichter.

The Court: All right.

Mr. Bronson: The same objection goes to these documents, if your Honor please, by the defendant.

The Court: Overruled. It may be received. The Exhibit 55-N attached to the deposition will be received into evidence and marked Plaintiff's Exhibit 39. That is a three-line letter. The identification is at the bottom left side.

The Clerk: Plaintiff's Exhibit 39 in evidence.

---

### PLAINTIFF'S EXHIBIT 39

Reads in words and figures as follows, to wit:

“RTH:

I talked to Mr. Dichter who was in B. A. and he gave me a favorable report regarding the glucose situation there. Will discuss this with you on Monday.

CWM,

(initialed) CWM.

4 PM Wed 7/3/46”

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: Now, we make the same offer with reference to the memorandum entitled Statement for Dichter: dated June 24, 1946, which is Plaintiff's Exhibit 45-N for identification in the Heymsfeld deposition.

The Court: All right.

Mr. Bronson: Is that the letter of September 20th?

Mr. E. B. Stanton: 45-N, that is that memorandum.

Mr. Bronson: I make a further special objection, if your Honor please, that is a self-serving document which contains no information of any assistance to even their own theory.

Mr. E. B. Stanton: That could not be self-serving. It was not written by us.

Mr. Bronson: I have one marked 45-N signed by Berger. [262]

The Court: This is 48.

Mr. Bronson: 45-N.

Mr. E. B. Stanton: This is 48-N.

Mr. Bronson: This is 45-N.

Mr. E. B. Stanton: I am sorry.

The Court: That is already in. That is just a single line. This is a long one, Statement for Dichter, signed "Hiram Walker," is that it? Is that a signature or what? It says "Alcohol Hiram Walker."

Mr. E. B. Stanton: I think that is reference to something else.

(Testimony of G. Fred Berger.)

The Court: To something else.

Mr. Bronson: I was under a misapprehension as to the exhibit.

The Court: This is a statement. Overruled. It may be received. Exhibit 48-N attached to the deposition will be received as Plaintiff's Exhibit—

The Clerk: Is it 48 or 45-N?

The Court: 48-N. That is an "8" as I get it.

The Clerk: It will be Plaintiff's Exhibit 40 in evidence.

---

#### PLAINTIFF'S EXHIBIT 40

Reads in words and figures as follows:

June 24, 1946.

"Statement for Dichter:

"During the month of May Schenley thought they would require a very large quantity of glucose. Personnel on the Pacific Coast negotiated with Whipple, a Los Angeles broker, with CIA. Engraw Commercial & Industrial, S. A. (address: San Martin 329, Buenos Aires) for 1,135 tons of Argentine glucose, the price to be 1.375 pesos per kilogram, C.I.F. Los Angeles. This figures out 0.22293c per lb. f.o.b. Los Angeles, including 2c duty. The above for shipment as follows:

"Terms—Sample to be approved, letter of credit for the full value to be opened in favor of Engraw. The same was never submitted and the credit was never opened and it develops that Schenley does

(Testimony of G. Fred Berger.)

not need this material. Therefore, we asked for cancellation of any responsibility due to negotiations. Engraw appears willing to cancel but is asking 2c per pound to cover loss.

I suggest you proceed to Buenos Aires immediately to learn the following:

- (1) The present situation and price of glucose in the Argentine.
  - (2) Is glucose in short supply?
  - (3) Is export license required?"
- 

Mr. E. B. Stanton: I now offer from the same deposition Plaintiff's Exhibit 54-N for identification, [264] being the wire to Metcalf signed Dichter. I may state that I am now covering some wires and matters that were not demanded in the statement for genuineness. These were attached to the deposition and have been referred to in the testimony.

The Court: All right.

Mr. Bronson: The same objection, if your Honor please, as previously stated.

The Court: Overruled. It may be received as Plaintiff's Exhibit now, Plaintiff's Exhibit 55-N (54-N) attached to the deposition received as Plaintiff's Exhibit 41.

Mr. Bronson: I misunderstood again. Are you offering No. 54-N?

The Court: This is 54, Dichter's short cablegram.

Mr. Bronson: A short cablegram, very well.

The Clerk: This is Plaintiff's Exhibit 41 in evidence.



(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT 41

Reads in words and figures as follows:

Recd July 26/952

“Vsshlenley NY GA

This Mackay Radio 852 AM

TWX-4/RJW874

Rio 26/25 25 1027 P

LC CW Metcalf Schenley

350 Fifth Ave New York

Please wire money citibank Rio pronto will call  
Monday important discuss Baires situation fear  
misunderstanding costly.

DICHTER.

End at 854 AM

ACK PLS

Msg red OK end”

---

Mr. E. B. Stanton: I now offer in evidence from  
the same deposition Plaintiff's Exhibit 37-N, being  
a cable to Engraw signed Schenley Metcalf.

The Court: All right. Objection to this?

Mr. Bronson: Yes, your Honor.

The Court: Overruled. It may be received,  
Plaintiff's Exhibit 42.

The Clerk: It will be Plaintiff's Exhibit 42, your  
Honor.

The Court: It is No. 37-N to the deposition. It  
is a one-line cable.

The Clerk: That will be Plaintiff's Exhibit 42 in  
evidence.

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT 42

Reads in words and figures as follows, to wit:

“New York 7/3/46

“CIA. Engraw Commercial & Industrial, S.A.  
San Martin 329

Buenos Aires, Argentina

Our representative E. R. Dichter will call at your  
office tomorrow.

SCHENLEY,  
METCALF.” [266]

---

Mr. E. B. Stanton: Next, a cable of date July 10  
to Dichter, signed Schenley Metcalf in the deposi-  
tion Plaintiff's Exhibit 53-N.

The Court: Subject to the usual objection, which  
is overruled, the exhibit will be received as Plain-  
tiff's Exhibit 43.

The Clerk: That is Plaintiff's Exhibit 43 in evi-  
dence.

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT 43

Reads in words and figures as follows, to wit:

“Western Union

July 10, 1946

Cablegram

Mr. E. R. Dichter

Alveahotel

Buenos Aires, Argentina

Unable make connection today will telephone Engraw two oclock tomorrow.

SCHENLEY METCALF.

GWM:MRT”

---

Mr. E. B. Stanton: Now I offer 51-N from the deposition.

Mr. Bronson: The same objection, if your Honor please.

The Court: Subject to the same objection, which is overruled, it will be received as Plaintiff's next exhibit.

The Clerk: Plaintiff's 44 in evidence. [267]

---

PLAINTIFF'S EXHIBIT 44

Reads in words and figures as follows, to wit:

“New York 7/3/46

“Mr. E. R. Dichter

Alvearotel

Buenos Aires, Argentina

Your position is we have no contract stop Date

(Testimony of G. Fred Berger.)

of original negotiation May 23, 1946 stop Difference  
in price figuration probably exchange basis .29778  
per peso.

METCALF."

---

Mr. E. B. Stanton: I next offer 52-N from the  
deposition.

The Court: Any objection?

Mr. Bronson: Yes, your Honor.

The Court: Subject to the same objection, which  
is overruled, it may be received.

The Clerk: Plaintiff's Exhibit 45 in evidence.

---

#### PLAINTIFF'S EXHIBIT 45

Reads in words and figures as follows, to wit:

"NLT 176 Baires 17 9

NLT CW Metcalf Schenley 350 Fifthave NY

Please phone me retiro 8311 Engraw tenth four  
oclock.

DICHTER.

Sent 4 cable 824 a pse ack" [268]

---

Mr. E. B. Stanton: The same offer in respect to  
50-N from the deposition.

Mr. Bronson: 50-N?

Mr. E. B. Stanton: 50-N is the number.

The Court: Overruled. It may be received.

The Clerk: Plaintiff's Exhibit 46 in evidence.

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT 46

Reads in words and figures as follows, to wit:

“New York 7/2/46

“Mr. E. R. Dichter

Alvearotel

Buenos Aires, Brazil

Please telephone me.

C. W. METCALF.”

---

Mr. E. B. Stanton: I now offer Plaintiff's 33-N from the deposition.

The Court: Subject to the same objection, which is overruled, and it may be received.

Mr. Bronson: Yes, your Honor.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 47 in evidence.

---

PLAINTIFF'S EXHIBIT 47

Reads in words and figures as follows, to wit:

“June 11, 1946.

“File Memorandum:

I talked to Mr. Whipple regarding Argentine glucose. I asked him to what extent he and his principals were obligated at the present moment. He stated that they had bought 1,135 tons on our

(Testimony of G. Fred Berger.)

authorization and had paid for the first fifty tons which was on dock ready for shipment at Buenos Aires. I read the following paragraph to Mr. Engraw, which was contained in a cable received yesterday from Engraw: If You Don't Desire Coverage Will Liquidate But If Loss Occurs Must Protect Our Interests . . . I asked Mr. Whipple to call Engraw on the telephone at our expense to determine what the loss would be in liquidation of both the fifty tons ready for shipment as well as the balance of the contract. Mr. Whipple promised to get Engraw on the 'phone as soon as possible and call me back tomorrow. I told Mr. Whipple that we regretted this confusion regarding this matter and that it was not our intention to cause either him or his principals any out-of-pocket expense.  
CWM:MB''

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Mr. E. B. Stanton: Next, 38-N from the deposition.

The Clerk: Is this admitted, your Honor? [270]

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 48 in evidence.

Mr. Bronson: Is that 38-N?

The Clerk: 38-N.

Mr. Bronson: We understood that that goes in over objection, your Honor.

The Court: The usual objection and it is overruled.



(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT 48

reads in words and figures as follows, to wit:

“Inter-Office Memorandum

“July 11, 1946.

“I talked over the telephone this afternoon with Mr. Berger, one of the owners of Engraw Company, Buenos Aires, Argentina.

Engraw made a firm contract for the 1135 metric tons of corn syrup. They agreed to open letter of credit, expecting Schenley to open credit in their favor. They are in default of this contract since they have failed to open credit. They have taken delivery and paid of their own funds for 50 tons of this corn syrup and will take another 160 tons before August 1.

Engraw find themselves in a tight spot since they registered this contract with the Chamber of Commerce and are now in violation. Both their reputation and the reputation of Schenley is in jeopardy.

Berger stated that there is no question in his mind about it costing approximately \$31,000 to cancel this contract.

Engraw's profit on this transaction was to have been approximately \$15,000.

Whipple's profit on this transaction would have been in the neighborhood of \$22,000.

Berger seemed very reasonable over the telephone and was not antagonistic or threatening in

(Testimony of G. Fred Berger.)

manner. He is decidedly worried and he hopes that we can adjust this matter promptly on a basis that would preserve his reputation in the Argentine.

“C. W. METCALF.

CWM:MRT”

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Q. (By Mr. E. B. Stanton): Mr. Berger, I believe you stated, did you—or did you—that following September the 20th that you returned to Argentine? A. That is right.

Q. That is correct? A. Yes, sir.

Q. Did you have any further transactions with reference to this 1135 tons or 1,535 tons of glucose once you returned to the Argentine? [272]

A. Having received the result of our meeting with Mr. Heymsfeld on September 4th—

Mr. Bronson: I can't hear you.

Mr. E. B. Stanton: Speak a little louder, please.

A. I am sorry. I say, having received the result of our meeting with Mr. Heymsfeld as of September 4th, and having then written my letter of September 18th, there was nothing left for us to do except to see what arrangements we could make with the suppliers either to pick up the glucose or to compromise it or to do whatever was possible.

Mr. Bronson: I move to strike that out, the part that there was nothing left for us to do, with

(Testimony of G. Fred Berger.)

certain alternatives, as a conclusion of the witness.

The Court: Yes; that will be stricken. I think that is one question that can be answered yes or no.

He is giving you the reasons. He asked you if you did anything and the answer is no, not the reason why. We have already heard the negotiations which you had.

Q. (By Mr. E. B. Stanton): You had no further negotiations with Schenley Corporation, is that correct? A. No.

Q. All right. What did you do in respect to the glucose yourself after you returned to Argentine?

A. We immediately made contact with the suppliers to [273] discuss the matter of the undelivered glucose, we having at that time taken up our commitments to the extent of 351.7 tons, and about October 9th we offered them a compromise of 20 cents a kilo which they refused. We then took the steps at the same time to attempt to sell the glucose in accordance with our letter of September 18th in all points of the world wherever there was a market for glucose. I have a file——

Q. Now, Mr. Berger, in that respect will you detail just what you did in your efforts to sell this glucose?

A. Well, we sent cables and letters to Sweden, to Holland, to Italy, to Switzerland, to Manila, to Bombay, and every other point where there might have been a market for glucose. We also attempted

(Testimony of G. Fred Berger.)

to deal with people in Sao Paulo in Brazil who had further contacts which we did not have. Well, we practically canvassed the world in an attempt to get rid of the balance of the glucose. I have a file here, incidentally, that shows those better than I can describe them, if it means anything to you.

Q. Well, if it will refresh your recollection relative to what you did and give us further details.

The Court: I do not think the details are necessary. I think as long as he tells what he did it is sufficient. I do not know whether you are required to go into details.

Q. (By Mr. E. B. Stanton): As a result of these [274] negotiations which you say you made were you able to dispose of any of the glucose?

A. Eventually we made a contact with Chocolad Fabricken Merabau in Sweden and disposed of not only the 351 tons which we had picked up out of our commitments, but about 120-odd tons of one of the other suppliers.

Q. Is that the only portion of the shipments that you were able to sell?

A. Yes. We were able, as I said, originally testified to originally, we made an offer of 20 centavos a kilo which then was not agreed upon. The whole matter, in accordance with the contracts and the procedure under the Bolsa De Commercio or the stock exchange, if you will, was then subjected to arbitration, and the arbitration, without proceeding the months of January and February, and

(Testimony of G. Fred Berger.)

finally, just as decisions on the arbitrations were—well, may I correct myself, please?—proceeded through the months of December, January being a court holiday there was no procedure in January, and then through February and part of March, at which time we then arranged, just about the time the arbiters were ready to give their decision and the litigation was getting under way, fully under way, the suppliers then accepted our original offer of compromise of 20 centavos a kilo.

Q. Was that 20 centavos the only consideration that [275] you were to pay, Mr. Berger? You mentioned 20 centavos. Was that the only consideration you were to pay?

A. 20 centavos per kilo on all of the undelivered portion.

Q. Was that the only obligation that you undertook?

A. We signed an agreement with the suppliers, if that is what you mean. I don't quite understand.

Q. By the way, Mr. Berger, when did this Swedish sale take place?

A. As I recall it, the negotiations were under way, I think, in late March, and the consummation was in April, or either in late April and the consummation was in May. I am not quite clear as to the months and I have nothing to tie it into. I was just trying to remember something that I could tie the dates in, but I can't do it now.

Q. Of 1947?

A. Of 1947.

(Testimony of G. Fred Berger.)

Q. Prior to that time you had been able to dispose of no glucose? A. That is right. [276]

Q. (By Mr. E. B. Stanton): By the way, Mr. Berger, did you ever pay that tax on your application for export permits?

A. Yes. Our applications for export——

Q. Just a minute. When did you pay the tax?

A. About around November 6th, 1947, because at that time we wanted our export licenses.

Q. And did you receive your export licenses?

A. We did.

Q. Based upon the same application that you had made in May? A. That is right.

Q. I ask you if you can identify these documents?

A. Yes. These are the export licenses in question.

Mr. E. B. Stanton: I now offer these as a group exhibit.

Mr. Rowe: Let me see them, please.

Mr. E. B. Stanton: Haven't you a photostatic copy?

Mr. Rowe: We have no photostatic copy.

Mr. L. B. Stanton: You did have them. We furnished you with photostatic copies.

Mr. Rowe: I don't see them here.

Mr. L. B. Stanton: Well, we furnished them to you.

Mr. Rowe: We asked for it but we did not get it. We got the application——



(Testimony of G. Fred Berger.)

Mr. Bronson: They aren't among the documents which [277] you supplied us with.

Mr. E. B. Stanton: I offer these export permits in evidence.

The Court: All right.

Mr. Bronson: We will object to the admission of those documents, on the grounds that they are incompetent, irrelevant and immaterial.

The Court: All right. The objection is overruled.

Mr. Bronson (Continuing): In view of the last testimony of the witness, as to how that transaction was handled, how the entire amount that they are claiming for was disposed of.

The Court: Well, objection overruled.

The Clerk: Plaintiff's Exhibit 49 in evidence.

The Court: Do you offer those three as one exhibit?

Mr. E. B. Stanton: One group exhibit.

The Court: All right. I think we better put the contents in: These three exhibits refer to the number of the application for license already in evidence, 192.468, 202.501 and 202.502. They are entitled Permission to Export. They give the name of the company as the plaintiff here, and the first one is for 935,000 kilos of corn glucose, liquid crystallized, in wooden kegs; value 1,215,500; dated November 7, 1946; the authorization expires on February 5, 1947. [278]

On the inside page, it recites the request of the export firm of Engra, they are handed a copy of

(Testimony of G. Fred Berger.)

the permit D-11.210 of this date, the date of November 7, 1948, corresponding to the export application number 192.468 of 27-5-46. The only object of showing them to the legal judicial authorities of the United States of America, dated August 29th, Buenos Aires, signed by Hector A. R. Alfonso, Director of Import and Export, and then there is a certificate by Jose Constantino Barro, Secretary of Internal Industry and Commerce. It certifies that the signature is that of Dr. Alfonso, Doctor of Export and Import of this Secretariat. Then, there is an additional authentication by the Secretary of the Exterior, Foreign Office.

In addition to that, there is another certification that the seals and stamps correspond to the application.

Then, there is a certification by the American Embassy to the Vice Consul that the seal and the signature of Diaz and the seal of the Ministry of Foreign Affairs are genuine.

The second one is identical in substance, except that it refers to 200,000 kilos of a value of \$260,000.00 dated in November, dated the same day. The expiration date is also the same, the 5th of February, 1947.

The third one is in substance the same and relates to 400,000 kilos at a price of 528,000 pesos; dated the same date, November 7, 1946, and the expiration date given as [279] February 5, 1947.

All right. Have you any more?

Mr. E. B. Stanton: Yes, I have one.

(Testimony of G. Fred Berger.)

Q. Now, Mr. Berger, I show you what purports to be an original document of four pages clipped together, a document entitled Free English Translation, and see if you can identify that?

A. Yes, sir. This is the document and translation of the agreement entered into between the suppliers and the company Ingraw.

Q. Do you know who made, who prepared the free English translation?

A. Yes, the office of Dr. Goytia.

Q. In South America?

A. Yes, sir, the attorney.

Q. And do you recognize the signature hereon, on the face of the document?

A. These are merely identifying pages. The signatures are on the fourth page. Yes, I recognize these signatures.

Q. Those are the signatures of the suppliers, are they?      A. Yes.

Q. And of yourself?      A. That is right.

Mr. E. B. Stanton: I now offer this in evidence.

Mr. Bronson: I am going to ask to have the last answers [280] read, as I did not hear them. Mr. Rowe and I have the same trouble and I don't think we are deaf. It is just that the witness lets his voice drop.

(Record read by reporter.)

The Court: He was identifying the signatures.

Mr. Bronson: All right, thank you, Judge.

The Court: And he said it was made by Dr. Goytia.

(Testimony of G. Fred Berger.)

Mr. Bronson: And I want to say we haven't seen this document before, although we asked to put it in a deposition about a week ago and counsel unfortunately neglected to make a carbon for us.

The Court: All right. I see.

Mr. E. B. Stanton: I have provided counsel with a photostat of the Spanish. I don't have another carbon of the free English translation.

The Court: All right. It may be received.

Mr. E. B. Stanton: I offer a photostatic copy of the document referred to, together with the translation.

The Court: Are you objecting to this?

Mr. L. B. Stanton: You can have a copy of the translation made for you.

Mr. Bronson: Thank you very much.

The Court: Is there any objection to this?

Mr. Bronson: No objections, your Honor.

The Court: This is merely an award on the arbitration. [281]

Mr. Bronson: I did not understand it was such. I understood it was an agreement entered into between the parties.

Mr. E. B. Stanton: That is right.

Mr. Bronson: It is not an award. I think the evidence is that a compromise was effected between the parties.

The Court: Well, I shouldn't have said "arbitration." It is a compromise agreement. All right. It may be received.

The Clerk: Plaintiff's Exhibit 50 in evidence.

(Testimony of G. Fred Berger.)

### PLAINTIFF'S EXHIBIT 50

Between Compania Engraw Comercial e Industrial S.A., hereinafter named "Engraw," on the one hand, and S.I.F.A.R. S.A., R. H. Gonzalez y Cia. S.R.L., Auge Freres y Cia., and Eugenio Lang S.R.L., on the other hand,.....  
And Whereas.....

A) "Engraw" signed the contracts for the purchase of glucose hereinafter described:.....

Two Contracts With SIFAR S.A., drawn up on printed forms numbers 29.563 and 30.854 of the Stock Exchange of Buenos Aires, whereby SIFAR S.A. sold to "Engraw" and the latter acquired in ownership Six Hundred (600) and Four Hundred (400) tons respectively, of glucose, quality and price as specified in said instruments.....

One Contract with R. H. Gonzalez y Compania S.R.L. drawn up on printed form number 30.619 of the Stock Exchange of Buenos Aires, whereby R. H. Gonzalez y Compania S.R.L. sold to "Engraw," and the latter acquired in property, Two Hundred (200) tons of glucose, quality and price as specified in said instrument.....

One Contract with Auge Freres y Cia, drawn up on printed form number 30.288 of the Stock Exchange of Buenos Aires, whereby Auge Freres y Cia. sold to "Engraw" and the latter acquired, Seventy Five (75) tons of glucose, quality and price as stipulated in said instrument.....

(Testimony of G. Fred Berger.)

One Contract with Engenio Lang S.R.L. drawn up on printed form No. 30.132 of the Stock Exchange of Buenos Aires, whereby Eugenio Lang S.R.L. sold to "Engraw" and the latter acquired, Fifty (50) tons of glucose, quality and price as stipulated in said instrument.....

B) And Whereas Compania Engraw Comercial e Industrial S. A., declares that said contracts were signed by Companie Engraw for the purpose of complying with some purchase contracts which the latter in turn had entered into with Schenley Distillers Corporation of New York (San Francisco branch). ....

C) And Whereas Compania Engraw declares that it was compelled to interrupt the receipt of the merchandise acquired from SIFAR S. A., R. H. Gonzalez y Compania S.R.L., Auge Freres y Cia, and Eugenio Lang S.R.L., on account of Schenley Distillers Corporation having broken unexpectedly and without any valid reason whatsoever, the above-mentioned contract entered into with Compania Engraw .....

D) And Whereas as a consequence of said breach of contract, as declared by Compania Engraw, the latter was compelled to institute against Schenley Distillers Corporation, an action for recovery of damages, said action is pending with the Federal Court of the City of Los Angeles, United States of America under the following caption: "Com-



(Testimony of G. Fred Berger.)

pania Engraw Comercial e Industrial vs. Schenley Distillers Corporation." On the other hand, SIFAR S. A., R. H. Gonzalez y Cia. S.R.L. Auge Freres y Cia. and Eugenio Lang S.R.L., without acknowledging the truth of the declaration made under B), C) and D), have acquiesced to enter into an Agreement with Compania Engraw Comercial e Industrial S.A. under the following conditions: .....

Article First: Compania Engraw Comercial e Industrial S.A. shall pay to SIFAR S.A., R. H. Gonzalez y Cia. S.R.L., Auge Freres y Cia., and Eugenio Lang S.R.L. \$0,20 Arg. Cy. (Twenty Cents Argentine Currency) per Kilo of the Glucose which Engraw failed to receive from the above-mentioned sellers. Said payment shall be considered a total compensation for the total and final cancellation of the above-mentioned contract. Said cancellation shall become effective after the above-mentioned payment is made, and providing same is effected within the term hereinafter stipulated.....

Article Two: The payment referred to in the preceding Article shall be made by Compania Engraw Comercial e Industrial within the term of Forty (40) working days as from the date of this agreement. This term shall mature automatically, there being no judicial or extra-judicial intervention required.....

Article Three: Said payment shall be made by

(Testimony of G. Fred Berger.)

Compania Engraw Comercial e Industrial with funds furnished by Cia. Engraw Export and Import Co. S.A., with domicile in Montevideo, Uruguay through the law office of Dres. Goytia. For these purposes the Central Bank of the Argentine Republic shall be requested for the pertinent authorization to import these funds into Argentina. Nevertheless, it is specifically stipulated that this article shall not modify the term fixed in the preceding article; therefore, the transfer of funds must be obtained within the agreed term of forty (40) working day, and under no circumstances whatsoever may the fact of not having obtained the transfer, or not having secured the authorization of the Banco Central alter said term.....

Article Fourth: During said term of forty (40) working days granted in Article Two, SIFAR SA. R. A. Gonzalez y Cia, S.R.L., Auge Freres y Cia, and Eugenio Lang S.R.L. shall keep in full force all the claims and actions they have at present against Cia. Engraw Comercial e Industrial S. A. binding themselves only to refrain from instituting any legal action whatsoever during said term, except the prosecution and completion of the arbitration proceedings pending before the Stock Exchange of the City of Buenos Aires. ....

Article Five: After the payment of \$0.20, Arg. Cy. (Twenty Cents Argentine Currency) per kilo of glucose not received, mentioned in Article One, within the term agreed in Article Two of this con-

(Testimony of G. Fred Berger.)

tract, the four vendor companys undersigned, SIFAR S. A., R. H. Gonzalez y Cia. S.R.L., Auge Freres y Cia., and Eugenio Lang S.R.L. shall consider all the purchases specified in the above-mentioned contracts (number: 29.563, 30.854, 30.619, 30.288 and 30.132), cancelled as far as the quantities not received up to this date are concerned; likewise, all the right and obligations emerging from said contracts shall remain without effect for the uncomplished with part of same, and shall be reciprocally released in full, except for the stipulations of the following article. ....

Article Sixth: Engraw binds itself to give participation in any sum recovered as a result of the lawsuit pending against Schenley Distillers Corporation, mentioned in D), either by final decision of the Court or by extra-judicial settlement, to SIFAR S.A., R. H. Gonzalez y Compania S.R.L., Auge Freres y Cia, and Eugenio Lang S.R.L., under the following conditions: From the total amount obtained by Compania Engraw the following deductions must be made:.....

a) In the first place, Seventy Five Thousand Dollars U.S. Cy. This amount is destined to the reimbursement to Engraw of the payments the latter shall effect to SIFAR S.A., R. H. Gonzalez y Compania S.R.L., Auge Freres y Cia., and Eugene Lang S.R.L., in accordance with Art. 1 and of part of the losses suffered by Engraw in other respects, as a result of this matter. ....

(Testimony of G. Fred Berger.)

b) In the second place a deduction shall be made for the amount of the actual and proved expenses suffered by Engraw in the handling of the above-mentioned lawsuit (costs, expenses, fees, etc.).....

.....These two items having been deducted, the net balance shall be distributed among Compania Engraw SIFAR S.A., R. H. Gonzalez y Compania S.R.L., Auge Freres y Cia., and Eugenio Lang S.R.L., in proportion to the amount of tons of glucose that each one of them has on hand at present, and which correspond to the above-mentioned contracts, same being the following:

Compania Engraw.....	451.7 tons
SIFAR S. A.....	800 tons
R. H. Gonzalez y Compania S.R.L.....	158.3 tons
Auge Freres y Cia.....	75 tons
Eugenio Lang S.R.L.....	50 tons

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Total .....1.535 tons

.....Consequently, it is expressly and clearly agreed, that in case a lower amount than that stipulated in (a) and (b) is obtained from Schenley Distillers Corporation, i.e., Seventy Five Thousand Dollars U.S. Cy., plus the expenses derived from the handling of the lawsuit pending between Compania Engraw and Schenley Distillers Corporation, then nothing shall be payable by Compania Engraw to SIFAR S. A., R. H. Gonzalez y Compania S.R.L., Auge Freres y Cia. and Eugenio Lang S.R.L., as regards the provisions mentioned in this Article. ....

(Testimony of G. Fred Berger.)

Article Seven: If possible, Compania Engraw shall consult with the other interested parties before entering into any arrangement or settlement with Schenley Distillers Corporation. ....

Article Eight: Compania Engraw binds itself to make use of any legal recourse that may be pertinent against unfavourable judicial decisions which may be handed down in connection with said lawsuit, except those which in the discretion of Engraw do not correspond or which would only result in unnecessary expense. In the case that Engraw considers some recourse is not justified, it shall inform accordingly the other parties subscribing this instrument, who may insist on filing same, and if so all the expenses and fees arising from said step shall be for their account. ....

Article Nine: Engraw shall deliver a copy of the action instituted against Schenley Distillers Corporation to the law office of Dr. Beccar Varela, likewise sending the latter, every ninety days, a report on the progress of the lawsuit. ....

In witness whereof the parties sign five identical copies of this document, one for each of the subscribers, in the City of Buenos Aires, on April ninth, 1947. ....

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The Court: All right.

Q. (By Mr. E. B. Stanton): In addition, Mr.



(Testimony of G. Fred Berger.)

Berger, to the twenty centavos, did you have any other expenses connected with the disposal of this glucose problem?

Mr. Bronson: We object to that as incompetent, irrelevant and immaterial, under any theory of damages in this case.

Mr. E. B. Stanton: I am referring to the document itself in evidence where it provides for the various expenses to which he has gone.

Mr. Bronson: I know, but in admitting it, in allowing it to be admitted without objection we are not agreeing that the memorandum sets up an arrangement between other parties whereby they specify what is in and what is out as expenses, for damages.

The Court: I don't know what—what are you trying [282] to elicit?

Mr. E. B. Stanton: Well, merely the items on damage to which the plaintiff corporation has actually suffered, inclusive of legal expenses, various other expenses connected with the whole transaction, all of which reacted to their damage.

The Court: Let me read your complaint and your pleadings here.

Mr. L. B. Stanton: I may state, we take the definite position on that, that it would be the difference between the contract price and the market price, and I don't think it is a matter of pleading any cash moneys outlaid.

Mr. Bronson: While you are bringing that up,



(Testimony of G. Fred Berger.)

if we are not interrupting your Honor's train of thought——

The Court: On damages, you can't take an inconsistent position.

Mr. L. B. Stanton: That is right.

The Court: You have to use a criterion.

Mr. L. B. Stanton: Well, that is our position, your Honor.

The Court: And if you are taking the position that you are entitled to a different market price, it is not a question of general damages—I mean it is not a question of special damages.

Mr. E. B. Stanton: I will agree with your Honor on [283] that.

The Court: And you haven't pleaded any special damages.

Mr. L. B. Stanton: And we haven't pleaded any special damages.

Mr. Bronson: Let me make this point: That Exhibit B says you are going ahead to dispose of that glucose. This is the dispute they proved that they went in there and compromised and set a figure for their loss.

Mr. L. B. Stanton: That is not the point.

The Court: That is a question of law to be determined. I am merely going into the criterion of damage. Any special damages such as expenses are not material and on that basis I will sustain the objection.

Mr. L. B. Stanton: I made that point specifi-

(Testimony of G. Fred Berger.)

cally because we knew Mr. Bronson was going to bring up a thing like that.

The Court: It is nice to know your opponent.

Mr. Bronson: It is nice to have that clear-minded ability, and he has misquoted me there.

Mr. L. B. Stanton: Pardon me.

The Court: All right.

Mr. E. B. Stanton: Nothing further from this witness, at this time.

The Court: All right. This is a good time to quit. We will adjourn until tomorrow morning at 10:00 o'clock. [284]

(Whereupon, an adjournment was taken until Thursday, June 3, 1948, at 10:00 o'clock a.m.) [285]

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Thursday, June 3, 1948

G. FRED BERGER

(Recalled)

Cross-Examination

By Mr. Bronson:

The Court: Proceed.

Q. (By Mr. Bronson): Mr. Berger, you testified yesterday that in connection with your application for export licenses you did not put up the tax which was applicable to those for the reason that the letter of credit that you understood would be forthcoming had not been posted as yet, is that true?

A. Yes, sir.

(Testimony of G. Fred Berger.)

Q. It is true, is it not, though, prior to that date it purchased 50 tons of glucose on this transaction on your own credit?

A. No. The 50 tons were purchased the early days of June.

Q. In the early days of June? A. Yes.

Q. Are you certain about that?

A. I am quite certain.

Q. Well, you did that, in other words you posted your own credit for the 50 tons at the time that you were withholding the placing of the tax so that the permits would be [309] issued—correct?

A. Yes. It was part of our commitments under our contracts.

Q. Did you ship that 50 tons?

A. No, sir.

Q. You testified about the rate of exchange, Mr. Berger, and made a distinction yesterday between free exchange and the controlled exchange having to do with the export of Argentine commodities. Do you recall that testimony?

A. Yes, sir.

Q. And you say the rate is 25 centavos—I mean four pesos to the dollar in free exchange and the pegged or controlled exchange on this commodity was 3.3582? I may be a little in error there.

A. 3.3582 is correct.

Q. Yes. In other words, if I went down there myself with \$100 in American money today, I could go into the bank and secure 400 pesos, could I not, on that exchange or thereabouts?

(Testimony of G. Fred Berger.)

A. Approximately, yes, sir.

Q. And then if I wanted to divert that into the purchase of glucose for my own use down there that was not in export, I could purchase it without the application of the special or controlled price?

A. Do you mean if you had the pesos yourself?

Q. Yes.

A. It was an intra-country transaction?

Q. Yes. A. That is correct.

Q. The export price on Argentine glucose was \$1.23, that is, one peso and 23 centavos to one peso and 25 centavos in the month of August of 1946, was it not?

A. That would be a little bit difficult to know the exact money when that happened.

Q. I asked you about that in your deposition. Do you recall it?

A. Yes. It could be because at that time the price situation was more or less nominal.

Mr. Bronson: If it is not objectionable to you, I will read this and you can tell me if it is a correct statement. I am reading from page 102 of the deposition. You can follow me here if you prefer.

Mr. E. B. Stanton: All right.

Q. (By Mr. Bronson):

“Q. On August 2nd,”

on the next to the last page, that is the page immediately preceding one that contains your signature, we were referring to that letter, in the third from the last paragraph, reading:

(Testimony of G. Fred Berger.)

“In view of the fact that the Government just at this time has been delaying the issuance of export permits in its fight to reduce the local cost of living, there has been practically no activity in the glucose market which has remained steady at 123-125.”

A. Yes; that was the nominal market because of recent activity on the market.

Q. Well, that was the market in any event?

A. It was the nominal market.

Q. Let us put it this way: The market is made up of quotations, isn't it, on the exchange where the commodity is handled?

A. Mr. Bronson, a market is made up wherever it is, sometimes on active quotations, sometimes on bid and asked when there is only nominal activity. This happens to be nominal activity and it is in effect a bid and asked quotation, 123-125 being the asked quotation.

Q. That would mean that that was the asked quotation——

A. That is right.

Q. ——or the lower one was the bid——

A. 123-125 was——

Q. If you will excuse me—and the higher, the asked quotation?

A. That is not bid and asked.

(Interruption by the reporter.) [312]

The Court: Just a moment. You see, I sensed that. Either stop when counsel is talking, or, rather, begin when counsel has stopped. Let us get back and see what it is.

(Testimony of G. Fred Berger.)

(Record read by the reporter.)

The Court: Is that a question?

Mr. Bronson: That is a question.

The Court: You answer that question and then we will get back. [313]

A. That is not a bid or ask. That is the range of the asked quotation at the time.

Q. (By Mr. Bronson): All right, and there was no other market on export glucose than that particular figure set in the manner you have described, is that true? A. That is true.

Q. Now, isn't there, in fact, a difference between your domestic bulk market on glucose and the export market?

A. Yes, that is quite right.

Q. And you were talking and you intend now to testify that this figure that I just read to you—that range of figures applies to the export market, correct? A. That is correct.

Q. Carrying on further in the reading of this thing and to bring out that point, stopping you there, "Was that the export price or the domestic price?" That is my question of you in the deposition. Your answer: "I have already testified as to that this morning. I said in this particular statement there, there should have been inserted the word 'export' "

The Witness: That is right.

Q. (By Mr. Bronson): Now, the domestic bulk market was not the same as the export market, that is correct?



(Testimony of G. Fred Berger.)

A. No. That is correct.

Q. And there is quite a substantial difference, is [314] there not? A. That is right.

Q. And that is explainable, is it not, Mr. Berger, by the fact that you have a pegged price in exchange, that is, a pegged exchange on glucose that goes into foreign trade?

A. No. Your explanation isn't correct for that. The pegged exchange rate has absolutely nothing to do with the price of glucose, either for export or otherwise. The difference between the price of glucose for export and the price of domestic glucose is this: Domestic glucose is priced much lower than the export price and the Government permits a much higher price, a much higher quotation for export glucose for any country, not just the United States, to offset the local prices at which local glucose is sold.

Q. Can you supply the Court with any formula on the difference between the two, the domestic and the export prices?

A. I am not sure what you mean by formula?

Q. Well, the percentage, the differential between the two prices, as a normal or an average matter.

A. That I could hardly do, because that is done by the officials and I have no way of knowing how they arrive at that.

Q. Well, does it differ as much as 50 per cent. that is, the domestic price from the export price?

(Testimony of G. Fred Berger.)

Mr. L. B. Stanton: I would object to this line of examination, that Mr. Berger was not qualified as a market expert.

The Court: Well, he can answer. He can answer. You may answer, if you can. If not, he may say so.

The Witness: I am delaying only because I am trying to remember what might have been the case.

I am afraid I don't feel qualified to answer the question of differences, because they are not our figures. We are interested only in the export glucose.

Q. (By Mr. Bronson): When you are interested in export glucose, Mr. Berger, and are purchasing for export glucose, you are in competition with the market for local glucose, are you not?

A. I would say not insofar as an organization such as ours is concerned. The suppliers who make a specialty of that type of business would possibly be.

Q. Well, what you want to tell me is that I will have to content myself with the statement that there is a great difference between the domestic glucose market and the export glucose market and that you can't go further and give us some figure or fraction representing that great difference in the two prices? Do I understand you correctly?

A. That is correct.

Q. Now, I am referring you to Exhibit A and rather [316] than run back and forth as I did yesterday and the day before and got very tired doing

(Testimony of G. Fred Berger.)

it, Mr. Berger, I will read you one or two of these wires and if you want to look at them rather than content yourself with that, let me know.

The Witness: All right.

Q. (By Mr. Bronson): First is a wire from Mr. Whipple on the 20th of May, which is marked Defendant's Exhibit A. We put in Mr. Whipple's cable of that date, addressed to you, reading as follows:

"Confirming Sale 1300 Tons Glucose Accordance Offer April 24 May 29 Cable Earliest Shipping San Francisco Whose Name Credit. Can You Increase Earlier Shipments."

Mr. E. B. Stanton: May I interrupt you? You said May 29th.

Mr. Bronson: May 9th, I should have said. April 24 and May 9 are the dates.

Q. (Continuing): Now, at the time that you received that, you set about making some purchases, did you not, of glucose? A. Yesterday, yes.

Q. (By Mr. Bronson): After you received this May 20th cable?

The Witness: Which cable was this?

Q. (By Mr. Bronson): This was May 20th, from Mr. [317] Whipple to you, when he confirmed for the sale of 1300 tons?

A. No, sir. I testified that we made the actual purchases and signed the contracts on May 22nd, 23rd and 24th. Up until that time, whatever we did was more or less on option.

Q. Well, as to this 1300 tons, at the time you

(Testimony of G. Fred Berger.)

received the cable from Mr. Whipple saying that he confirmed sale of 1300 tons, you were ignorant of whom he had sold the 1300 tons to, were you not?

A. That is right.

Q. And you took it for granted and relied upon the statement that he had sold 1300 tons, did you not?

A. One would gather that from that telegram, that is correct.

Q. Well, didn't you rely on it and take it for truth?

A. We did not act on it and make any purchases.

Q. That isn't what I asked you, Mr. Berger. Did you accept it as fact?

A. Well, you are asking me about two years from the time it happened whether I accepted something as fact. Certainly we did not make purchases on the strength of that cable.

Q. Well, here is the next exhibit that I will call your attention to, Defendant's Exhibit B, cable from you on May 21st, directed to Mr. Whipple, reading: [318]

Mr. E. B. Stanton: May I suggest, Mr. Bronson, I think when he testifies with reference to these cables, there are so many—I do hate to have you go back and forth, but I think it would really be better to show them to the witness.

Mr. Bronson: I like to stay this far away from the bench. I don't like to intrude on the area of the Court.

(Testimony of G. Fred Berger.)

The Court: It does not matter. We do not stand on ceremony. When counsel is showing a document to the witness, he has permission to approach him.

Mr. Bronson: Thank you very much.

Q. (Continuing): I am showing you Exhibit B, now. Will you read that, please?

Now, that is a wire that says—I will have to take it; I am sorry. I don't have my copy of it right here:

“Subject Prior Sale Sixhundred Tons Available Price Onethirty Require Twentyfivepercent Downpayment.”

Then follows comments about delivery.

Had you purchased firm any glucose at the time that you made that wire to Mr. Whipple?

A. No, sir. The first three words would denote that.

Mr. Bronson: The next Exhibit E of defendant——

Mr. L. B. Stanton: E?

Mr. Bronson: E, yes.

(Mr. Bronson hands telegram to the witness.)

Q. Now, at the time that you transmitted this wire of May 23rd, had you made any [318] purchases on account of this transaction?

A. Yes. There is another telegram that is not in the record here on which we made our purchases. That is an answer stating that we had made the purchases, because on the receipt of the other cable we then were in a position to make these purchases and sign the contracts.



(Testimony of G. Fred Berger.)

Q. Well, I will show you now Plaintiff's Exhibit 7. Is that the one you refer to? That is the wire from you to Mr. Whipple, is it not?

A. That is right.

Q. What is the date of it? A. May 22nd.

Q. May 22nd? A. That is right.

But, there is still another wire.

Q. And that is a wire from——

A. From Whipple to us.

Q. ——from Mr. Whipple to you?

A. That is right. It must be his wire of May 21st.

Q. Well, it has been shown to you, hasn't it, in the course of these proceedings and marked in evidence? A. I believe so.

Q. Now, here, that is Exhibit C, isn't it?

Mr. E. B. Stanton: B comes first, Mr. Bronson. They are in sequence. [319]

Mr. Bronson: B?

The Witness: This is it (indicating)——

Mr. E. B. Stanton: B and C.

Mr. Bronson: I have already shown him B.

Q. I am showing you Exhibit D, that is a cable directed by Mr. Whipple——

The Witness: No.

Q. (By Mr. Bronson) (Continuing): ——to you, on the 23rd of May.

A. No. That is ours to Mr. Whipple.

Q. (By Mr. Bronson): That is yours to Mr. Whipple?



(Testimony of G. Fred Berger.)

A. That was after this (indicating document).

Q. Yes. You asked for the one from Mr. Whipple dated May 21st. Is that the one you received?

A. That is dated May 21st and received by us on the 22nd.

Q. That is the one—you made no purchases firm on his account until you received this cable that you have pointed out, that is Defendant's Exhibit C? A. That is correct.

Q. So we understand the contents of it, I will read it: "Accept 600 Tons One Thirty," that is price, is it not? A. That is right.

Q. (Reading): "Shipments One Hundred Fifty Monthly Will Accept Balance as Available Same Price Schenley [320] Distillers Will Open Credit Entire Amount but No Cash Deposit Try Ship During June Cable Confirmation."

Now, that is the first time that Mr. Whipple disclosed the name of the party with whom he was conducting this transaction?

A. That is correct.

Q. And it was following that, that you waived or withdrew the cash requirement and agreed to accept a letter of credit?

A. No, we did not withdraw. On receipt of that cable disclosing Schenley Distillers as the purchaser, we went—or I went, in this instance, to the supplier S.A.F.I.R., who was the one requesting the 25 per cent down payment, advising them who the purchaser was and they on the strength of the credit

(Testimony of G. Fred Berger.)

standing of the purchaser withdrew the requirement on the 25 per cent down payment.

Q. Yes. Now, did you know on the 21st of May when you received this cable from Mr. Whipple—rather, on the 22nd of May, I see that is the date, whether he had a contract for the purchase of that or not, by Schenley?

A. Did we know whether he had a private contract?

Q. Yes.

A. One would assume that from that telegram.

Q. What telegram are you referring to?

A. That (indicating). [321]

Q. The one I hold. You took the same reliance upon his statement as you did of the first cable I read to you referring to 1300 tons?

A. No. You assumed, in questioning me with regard to the first cable on 1300 pounds and suggested that I made the purchases on that and my answer was that I had not made. Following the cable on the 600 tons, he come back answering that and saying that he will accept any balance up to 1300 tons and on the basis of that telegram we were ready to act.

Q. You did not know anything other than this wire states, at the time you received this wire, as to the terms of the sale, if any sale had been made by Mr. Whipple to Schenley, that is all you knew about it?

A. That was the only information I had that

(Testimony of G. Fred Berger.)

Schenley was the purchaser. That is correct.

Q. And you testified that the exhibit, the letter of Mr. Donnelly, dated May 23rd and containing the postscript you saw for the first time in the early days of June?

A. Yes. It was sent to me with Mr. Whipple's letter of June 6th.

Q. May I take that, if you are through with it?

A. Yes.

Q. That goes in the plaintiff's file.

Will you state what experience you had with Mr. Whipple prior to May 20 of 1946 in actually closing any transactions [322] in export trade?

A. I have already stated in earlier testimony, either in my deposition or here, that our contract with Mr. Whipple up to that time had been either correspondence or cables looking toward the closing of any deals, but we had not closed any deals up until this one.

Q. In other words, for any commodity during the period that you had known Mr. Whipple, you had never had a sale confirmed by any kind of a communication until you got that cable of May 20th regarding 1300 tons?

Mr. E. B. Stanton: I object to the form of that question. It is a little confusing. That sale of 1300 tons is not what the witness acted upon, he stated he acted upon the one accepting the 600 tons.

Mr. Bronson: Well, there is another party to the communication. If it will help counsel, I will reframe it:

(Testimony of G. Fred Berger.)

Q. That is the first time, that is the receipt of this 1300 ton wire and that is dated May 20th, that you had any type of communication with Mr. Whipple whereby he confirmed a sale?

A. He did not confirm a sale—yes, he confirmed a sale on the 1300.

Q. Yes, that was the first time, wasn't it?

A. Yes. We had no other transactions completed until that time. [323]

Q. No experience at all with the way he handled himself in those transactions?

A. That would be true.

Q. Now, you were questioned by your counsel here, Mr. Berger, with regard to a conversation that you had with Mr. Heymsfeld, whom you correctly designated as the general counsel for Schenley, and that conversation took place in early September of the year 1946; do you recall that?

A. It took place on September 4, 1946. [324]

Q. Now, that took place where?

A. In the Schenley offices in New York City in the Empire State Buiding.

Q. And was Mr. Hosey and Mr. McManus there also?— A. That is right.

Q. And they are both associated in some manner with your company? A. That is correct.

Q. I want to ask you if in the course of that conversation you mentioned to Mr. Heymsfeld that your position was in coming up there that you had

(Testimony of G. Fred Berger.)

been waiting for some instructions from Schenley?

A. That is correct. But there is a memorandum that, if you want the complete memorandum, we have it available of the meeting so that you can check against that memorandum any time you wish.

Q. Well, I have a memorandum here that was secured from Mr. Heymsfeld by Mr. Mesirov, an attorney who represents you in the East somewhere, when Mr. Heymsfeld's deposition was taken. Is that the memorandum you are talking about?

A. I don't know, but there is a copy of that here so you can refer to it if you wish.

Q. If it is agreeable to counsel, I would like to read slowly and ask you if it was your understanding when that took place there—and stop me and correct me if he [325] incorrectly stated—and, counsel, that is Exhibit 59-N—if I may go ahead that way so that you understand.

Mr. L. B. Stanton: Do you expect to introduce that into evidence, Mr. Bronson?

Mr. Bronson: Yes—no. I am trying to question the witness about what happened at that meeting.

Mr. L. B. Stanton: It is suggested that you are talking about a document, and you had better introduce it into evidence. It is not in evidence at this time.

Mr. Bronson: I would rather proceed in my own way.

Mr. L. B. Stanton: We would prefer to have it in evidence.

(Testimony of G. Fred Berger.)

Mr. Bronson: You may offer it afterward. I am asking the witness about his recollection of his version.

Mr. L. B. Stanton: I object to questioning on a document which is not in evidence.

Mr. Bronson: Just a moment, if your Honor pleases.

The Court: Is that document identified at all in the record?

Mr. Bronson: Up to this point you mean?

The Court: Yes.

Mr. Bronson: No, your Honor. It happens to be one of the exhibits in Mr. Heymsfeld's deposition taken by the plaintiff in the East, not among those that were——

The Court: If it is in the deposition, if the question is to lay a foundation for facts which might lead to the [326] introduction, it is not objectionable merely because it is not in the record. If the answer is of great materiality, then counsel can request that the document be identified so that the record will show what the question related to.

Mr. Bronson: I am going to take the suggestion of counsel and offer it in evidence and then read it to Mr. Berger to see if he has any corrections to make of his understanding of what happened at that meeting.

The Court: All right.

Mr. L. B. Stanton: Then I make the objection on the grounds it is purely a self-serving document.



(Testimony of G. Fred Berger.)

Mr. Bronson: I don't think so.

The Court: Oh, no. This is an impeaching document.

Mr. L. B. Stanton: Oh, no. This is a memorandum which is made——

The Court: By the other side, that is true.

Mr. L. B. Stanton: ——by Mr. Heymsfeld.

The Court: Yes; to give another person's version and ask him if it corresponds to his. It is as though he were asked: Isn't it a fact that this is what took place? You can ask that question of a witness.

Mr. L. B. Stanton: Yes; that is true.

The Court: I think we used to call that in the old days the categorical question. The objection is overruled. This is merely introduced for the purpose of the cross-examination. [327]

Mr. Bronson: That is right. I will proceed as I suggested after your clerk has marked it.

The Clerk: Defendant's Exhibit Q.

Mr. Bronson: Will you mark that, and before you do that, may I suggest that we handle this the way we did the exhibits from the same deposition yesterday?

The Court: Yes. Don't take this copy.

Mr. Bronson: Don't take my copy. I am sorry.

The Court: Just a minute. He wants to check.

The Clerk: Defendant's Exhibit Q in evidence.

(Testimony of G. Fred Berger.)

DEFENDANT'S EXHIBIT Q

Is in the following words and figures, to-wit:

“Thursday, September 5, 1946

4:50 P.M.

Memorandum for the file

Schenley-Engraw

Had a conversation with Mr. Berger, Mr. Hosey and Mr. McManus. Mr. McManus was introduced to me as Mr. Hosey's son-in-law and is associated with him in business.

Berger's present position is that they have been waiting for instructions from us. I told Mr. Berger that we had notified them promptly upon being advised by them that they had a contract and that if Engraw chose not to sell at the market at that time Engraw was in effect carrying the glucose for its own account.

I restated our position with regard to the contract.

Berger stated that at the present time they could not secure cancellation for \$30,000 and that the present market was between \$1.08 and \$1.10. I told [Mr. Berger that we had no interest in the market fluctuations in glucose; that we had not completed an agreement for the purchase of the glucose; that Donnelly's and Baglin's letters—in the light of the conversations had with Whipple—could not have been taken by Whipple as concluding the transaction unless the samples were received and the proper purchase order issued by the properly au-

(Testimony of G. Fred Berger.)

thorized in Cincinnati. I further told [329] him that if Engraw was misled in the situation it was Mr. Whipple's responsibility and not Schenley's and that if Schenley offered any settlement it would offer it only on the basis of good will but it certainly would not consider Engraw to have been damaged to the extent that any market fluctuations following the 8th of June or any change in the position of Engraw's supplier resulted in an increase in the loss, if any, that Engraw would sustain. I pointed out to Mr. Berger the fact that the market for glucose around the 8th of June was very strong as indicated by his own communications at the time. I also pointed out to him that as late as August the market was still higher than the price at which Engraw had made its purchase, that it would have been possible even at that late date for Engraw to get out of the situation without loss. Berger's only response to this was that Engraw was waiting for Schenley to declare its position.

I renewed our offer of \$10,000. Mr. Hosey stated that he and Mr. Berger would return on the 18th of September.

In the meantime Berger is to send me photostatic copies of his purchase contracts. Berger is also to try to find out how much cancellation would now cost. I stated emphatically that we were not recognizing that we had any remaining interest in the liquidation of the glucose.

The September 18th conference is at Hosey's and

(Testimony of G. Fred Berger.)

Berger's request and I stated I would agree to meet with them again [330] but only on condition that it was clearly understood that we were not recognizing any obligation in the transaction.

Berger stated that his major interest in glucose was contracts beginning in 1947 and that these transactions had been a side issue.

Berger stated in the course of the conference that Metcalf had agreed over the telephone to the "liquidation procedure" and that this, Berger considered, kept the matter of disposition open. I pointed out to him that this was inconsistent with the correspondence with Goytia's office, and that so far as I knew, Metcalf had made no such arrangement.

R. T. H."

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Mr. Bronson: Mr. Berger, you will attend the reading of this now for the reason of the questions that I mentioned.

Mr. L. B. Stanton: I would suggest the witness be permitted to see the document. One has a legal memory and the other has an oral memory.

Mr. Bronson: That is a suggestion, your Honor. I have other thoughts. I may question him if he intends to correct me.

The Court: It is the same rule which the Supreme Court of the United States established with regard to a memorandum which may be used to refresh one's recollection. If, although counsel has

(Testimony of G. Fred Berger.)

the memorandum in front of him, he does [331] not show it to the witness, then it may not need even be offered. Then we have the rule established many years ago by the Supreme Court of California, that case we remember because it happened to be a leading case on the subject of impeachment and cross-examination, I think it is *People v. Jones*. I know it is in 167 Cal., page 1. But the distinction was laid down between impeachment and cross-examination that referred to showing the witness a transcript of what took place. The court said that the witness may be asked if as a matter of fact, at such and such a time he made such and such a statement. If the answer is "yes," the inquiry ends and he need not be shown before he answers that question the document which the counsel may have in front of him. If he answers "no," then the inquiry may be continued but it becomes impeachment, and if the witness asks for it, he is entitled to see the transcript.

So I think at the present time the witness is not entitled to see the memorandum because it is not a memorandum which he prepared. It is not refreshing his recollection. This is a cross-examination and impeachment of his version of the conversation, and rather than it being done by categorical questions, counsel intends to give the summary and ask if that corresponds with his recollection; and if it does not, then, of course, the witness will be allowed to give his own version. All right. [332]

(Testimony of G. Fred Berger.)

Q. (By Mr. Bronson): It is dated "Thursday, September 5, 1946, 4:50 p.m.

"Memorandum for the file.

Schenley-Engraw

"Had a conversation with Mr. Berger, Mr. Hosey and Mr. McManus. Mr. McManus was introduced to me as Mr. Hosey's son-in-law and is associated with him in business.

"Berger's present position is that they have been waiting for instructions from us. I told Mr. Berger that we had notified them promptly upon being advised by them that they had a contract and that if Engraw chose not to sell at the market at that time Engraw was in effect carrying the glucose for its own account.

"I restated our position with regard to the contract.

"Berger stated that at the present time they could not secure cancellation for \$30,000 and that the present market was between \$1.08 and \$1.10."

Stopping there, do you recall quoting the figures at about that price, and were they dollars or pesos?

A. Well, just speaking of the quotation as a quotation and not my recalling it, that would be pesos.

Q. All right. [333]

A. But may I suggest this or may I ask this, at least? We, too, made a memorandum, and if you are asking me to recall something I would like to have our memorandum to check that.



(Testimony of G. Fred Berger.)

Mr. Bronson: Well, either that or the counsel that represents your firm here can bring it in by way of redirect examination.

The Court: I think counsel is entitled to ask you that without your looking at it. I do not think it is the province of a witness to insist on seeing the memorandum merely because counsel has suggested it. You are not entitled to see it. You will have to answer it. In other words, you have given a version of the transaction orally and they have a right to question it either by leading questions or by that memorandum, and later on, if they conflict with each other you may do so. You are not entitled to take the two and examine them. It is not your right as a witness.

The Witness: All right.

Mr. Bronson: I will proceed, then, Mr. Berger.

“I told Mr. Berger that we had no interest in the market fluctuations in glucose; that we had not completed an agreement for the purchase of the glucose; that Donnelly’s and Baglin’s letters—in the light of the conversations had with Whipple— [334] could not have been taken by Whipple as concluding the transaction unless the samples were received and the proper purchase order issued by the properly authorized in Cincinnati. I further told him that if Engraw was misled in the situation it was Mr. Whipple’s responsibility and not Schenley’s and that if Schenley offered any settlement it would offer it only on the basis of good will but

(Testimony of G. Fred Berger.)

it certainly would not consider Engraw to have been damaged to the extent that any market fluctuations following the 8th of June or any change in the position of Engraw's supplier results in an increase in the loss, if any, that Engraw would sustain. I pointed out to Mr. Berger the fact that the market for glucose around the 8th of June was very strong as indicated by his own communications at the time. I also pointed out to him that as late as August the market was still higher than the price at which Engraw had made its purchase, that it would have been possible even at that late date for Engraw to get out of the situation without loss. Berger's only response to this was that Engraw was waiting for Schenley to declare its position.

"I renewed our offer of \$10,000. Mr. Hosey [335] stated that he and Mr. Berger would return on the 18th of September.

"In the meantime Berger is to send me photostatic copies of his purchase contracts. Berger is also to try to find out how much cancellation would now cost. I stated emphatically that we were not recognizing that we had any remaining interest in the liquidation of the glucose.

"The September 18th conference is at Hosey's and Berger's request and I stated I would agree to meet with them again but only on condition that it was clearly understood that we were not recognizing any obligation in the transaction.

"Berger stated that his major interest in glucose

(Testimony of G. Fred Berger.)

was contracts beginning 1947 and that these transactions had been a side issue.

“Berger stated in the course of the conference that Metcalf had agreed over the telephone to the ‘liquidation procedure’ and that this, Berger considered, kept the matter of disposition open. I point out to him that this was inconsistent with the correspondence with Goytia’s office, and that so far as I knew, Metcalf had made no such arrangement.”

That is rather long, Mr. Berger. Have you in mind any corrections of Mr. Heymsfeld’s statement of what occurred there as I read it?

Mr. L. B. Stanton: I object to that as being a compound question.

The Court: It is too long a statement. I thought you were going to take paragraph by paragraph and ask him if that correctly represents what took place. To ask him a composite question takes more than a Philadelphia lawyer. This witness is an intelligent witness.

Mr. Bronson: He is intelligent and this ground has been covered a good many times, I thought.

The Court: But a person can’t answer a question like that, and if you want it put that way, then I will withdraw what I said, that he should not see it, but say that he has a right to see it now.

Mr. Bronson: I stepped up for that purpose, your Honor, and I think the comment is very fair.

Q. Will you examine that and comment as you go along if you have any comments on the contents?

(Testimony of G. Fred Berger.)

You are at liberty, Mr. Berger, to make any comments now in response to that question as to the correctness of the statement.

A. In listening to your reading of it and also in examination of it, my own reaction is this: That I think I remember most of the items that are mentioned in this [337] memorandum, but I am not certain and can certainly not say that this was all of the conversation; and, as a consequence, I would like to see our own memorandum first, before giving you a direct answer. In other words, I do not know whether this is all of the conversation.

Mr. E. B. Stanton: Mr. Berger, I think counsel's question, if I may interrupt you for the moment, would be directed to reading that memorandum that you have, and if you find anything in the memorandum that you disagree with, that is what counsel wanted you to point out. That is the point in reading that, if you find yourself in disagreement.

Mr. Bronson: If I may add to counsel's statement, Mr. Berger, without limiting you to any matters that are not covered there, can you state that Heymsfeld's memorandum correctly states the subjects that he covers there?

A. May I look at this again, then, from that point of view?

Mr. Bronson: All right; go ahead.

The Witness: I am not sure exactly what now you want me to say.

(Testimony of G. Fred Berger.)

Q. I want you to state whether or not as to the subjects covered there they are correctly stated, and not limiting you to answer whether it was all that was said.

A. In other words, whether this from what Mr. Heymsfeld said is correctly stated in this memorandum, not [338] whether the items are correct but whether this is what he stated?

Q. No; you misunderstand me. You have a recollection of what happened at that meeting. You want to refresh your memory from your own recollection as to any additions. I am now asking if as to the matters that Mr. Heymsfeld speaks of his memorandum correctly states what happened in those regards at that meeting?

A. In other words, whether it correctly states what he said?

Q. No; whether it correctly states what happened; you said, he said, and everything.

A. Well, to the extent that these are listed here, I believe they represent what he may have said at that meeting.

Q. And as to the matters he said you stated does it correctly state those, too?

A. I believe so as far as these items are concerned.

Mr. Bronson: That being from my file, I will take it. That concludes the cross-examination, your Honor.



(Testimony of G. Fred Berger.)

The Court: All right. Any redirect?

Mr. E. B. Stanton: May we have our morning recess at this moment?

The Court: All right.

(Short recess.) [339]

### Redirect Examination

By Mr. E. B. Stanton:

Q. Mr. Berger, you have just completed the testimony referring to a conference with Mr. Heymsfeld in New York on or before September 4th or 5th, and you were shown a memorandum which stated Mr. Heymsfeld's side of the conversation. I now ask you for any further portions of the conversations which you recall and for any further subjects that were discussed at that conversation which were omitted from that memorandum which the defendant has introduced in evidence.

A. Yes; there are.

Q. Will you state them, please?

A. Well, in one discussion, or one matter that is pointed out in the memorandum is the market as of June 8th; and we pointed out to Mr. Heymsfeld at that time that the market for June 8th was, as I have earlier testified here, the same as the market of August, still a more or less nominal market.

Q. Was there anything further?

A. Yes. Then Mr. Heymsfeld also stated to us that Mr. Donnelly had no authority to sign any con-



(Testimony of G. Fred Berger.)

tract or any letter such as was signed. And then, finally, he advised us that though originally they had offered through the office of Goytia \$10,000 as settlement, that he was prepared to [340] increase that offer and apparently was going to let us know in the meeting scheduled for September 18th.

Q. Also on your cross-examination you were asked about quotations from the market, I believe in August, in which you had testified to offers at 1.23 and 1.25, referring to pesos. Were those offers at that figure—or, by whom were those offers made?

A. No. I testified that the market was nominal and that 1.23-1.25 was the asked price, not the bid price.

Q. That is the asked price from the manufacturer's standpoint?

A. No; from the supplier's point of view.

Q. From the supplier's point of view?

A. That is right.

Q. Do you know whether or not there were any sales made at that figure?

A. I do not know, but I don't believe so.

Q. If there were any you do not know of them?

A. I certainly do not know of them.

Q. At the time you made the first purchase to the Schenley account, that is the purchase of 600 tons, were you acting upon any other arrangements other than just the advice of Schenley and the price? Did you have anything else concerning specifications or know what you were quoting on?

(Testimony of G. Fred Berger.)

Mr. Bronson: I think that assumes a fact not in evidence, that he was acting on any information from Schenley at that time.

Mr. E. B. Stanton: I did not mean from Schenley, from Schenley directly, but the question went a little farther than that.

Q. In making the Schenley purchase were you acting simply on the word of Schenley and 600 tons, or was there any other arrangement outside of Schenley that would guide you in the purchase?

Mr. Bronson: May I ask you to restate the question, Mr. Stanton?

Q. (By Mr. E. B. Stanton): At the time you made the 600-ton purchase to the account of Schenley were you taking into consideration any terms of such purchase other than purely an amount quoted and name of the purchaser?

A. Oh, naturally. We had had quite some correspondence with Mr. Whipple in connection with an arrangement for the marketing of glucose, to which I testified earlier yesterday, and in that discussion or in that exchange of correspondence there had been already set up a basis on which we would work, this being a concrete illustration: We assumed, obviously, that whatever was being done was being done along the lines which had been outlined, which included the question of commissions, included the question [342] of his right to obtain his commissions, to add his commission to the price we had before, or to obtain his commission from the purchaser, whatever arrangement was

(Testimony of G. Fred Berger.)

necessary for him to obtain his compensation.

Q. And the same would apply to the matter of the specifications, quality of glucose, etc.?

A. Mr. Whipple knew that every ounce of glucose manufactured by the Pezza people—and this was all Pezza glucose—met all of the U.S.P. specifications, Baume 43-45, et cetera, et cetera; so that he knew definitely what he was offering.

Q. As a matter of fact, that was only——

Mr. Bronson: Wait a minute, wait a minute. I think that states a conclusion, your Honor, in the presence of the statement he got some information from Whipple. He states what Whipple knew, a conclusion, and we object to it.

The Court: I think I am going to strike that, what Whipple knew.

Q. (By Mr. E. B. Stanton): If I may direct your attention again to that question, Mr. Berger, please do not state what it is your understanding Mr. Whipple knew, but explain how, if it was, that information was communicated to Mr. Whipple.

A. That information was communicated to Mr. Whipple by correspondence. [343]

Q. So in closing this transaction you were relying not only on the telegram which you received, but also on your prior correspondence with Mr. Whipple?

A. That is correct.

Mr. E. B. Stanton: No further questions.

The Court: Any additional questions?

Mr. Bronson: I only have one question.

(Testimony of G. Fred Berger.)

Recross-Examination

By Mr. Bronson:

Q. I would like for you to indicate the correspondence, if you can, either by reference to these exhibits or otherwise, where you say he was aware of the specifications that were required in this transaction. They go more or less chronologically from the top down.

Mr. E. B. Stanton: If you are not satisfied with the order of those exhibits, you can place them in chronological order if you so desire.

The Court: Just a minute, gentlemen. You are dealing with exhibits in charge of the clerk.

The Witness: I am not changing them around.

The Court: You are not going to disorganize them, because otherwise it would be confusing to the clerk.

The Witness: I won't change them around at all, your Honor.

Mr. E. B. Stanton: I just merely meant, your Honor, [344] he could refer to them in chronological order.

The Court: Well, that is all right. It is quite a job to keep those in order, gentlemen. Go ahead.

A. Well, if reference in two places will do——

Mr. Bronson: All right.

A. I have got them here. If you want more, I can give them to you.

Q. Let me have the two that you mentioned.

(Testimony of G. Fred Berger.)

A. Yes. Well, in my letter of April the 3rd, 1946 I state "The specifications of the liquid glucose sent to you are the following: 43/45° Baume-not more than .005 SO<sub>2</sub>," etc.

Q. All right; that will do for that. You do not need to finish it for my purposes. That was your April 3rd letter, 1946?

A. That is right. 1946, that is right. And then in Mr. Whipple's letter to Mr. Baglin under date of May 21st he quotes the Baume 43-45, et cetera and et cetera. Obviously he had to get that information from us. He wouldn't have it from some other place.

Q. All right; that will satisfy me.

The Witness: These are in order.

Q. All right. The letter you mentioned on April 3, 1946 that, of course, was more than a month prior to the first wire you received on the Whipple negotiations in Los [345] Angeles?

A. Will you say that again, please?

Q. I say, that was a month and a half ahead of the very beginnings of this Schenley transaction?

A. Yes. That, I believe, without going into the detail of the letter again, was a part of our follow-up toward a general marketing of glucose, and not specifically for the one item.

Q. In the second letter you mentioned, you picked out Mr. Whipple's letter to Baglin—a letter, not a cable—written on May 23rd?

A. That is right.



(Testimony of G. Fred Berger.)

Q. In which he went to some detail?

A. I picked that only because it was the first exhibit I found that it was mentioned in.

Q. It is true, isn't it, that your first knowledge of the Schenley connection with this matter came to you, as you pointed out in the morning session today, with the telegram of May 21st in which Mr. Whipple telegraphed you and said "Accept 600 tons at 1 30" and that the Schenley Distillers would open credit?

A. That is correct.

Q. And you state—it may be repeating this—that up to that time you had not purchased firm any glucose?

A. That is right. Our purchases started when that [346] telegram was received.

Q. That was a night letter, as I pointed out to you, received on May 22nd in Buenos Aires?

A. The first thing, early in the morning on May 22nd.

Q. And on the same day you wrote a night letter dated May 22nd, addressed to Whipple, "Acting on your cable twentyfirst have completed firm purchases for Schenley account 1135 tons?"

A. That is correct.

Mr. Bronson: All right, that is all.

The Court: Step down. Call your next witness.

Mr. E. B. Stanton: At this time, in accordance with Rule 26, subdivision (d) we would like to introduce portions of the deposition of Ralph T. Heymsfeld taken in New York October 20, 1947. I am specifically limiting it to portions primarily be-



cause the large part of the deposition was taken up in the matter of exhibits. I am only referring to certain portions of the testimony.

The Court: I think, if you are going to do that, you had better read them then, rather than me read them, because if you are not going to use the entire depositions it is rather confusing.

Mr. L. B. Stanton: I might say, your Honor, we are adopting that for this purpose: There are two volumes, as [347] I understand, of this deposition, and the first volume is entirely of the introduction of a number of documents.

The Court: Yes.

Mr. L. B. Stanton: The second volume we will introduce entirely.

The Court: All right. When you do that, that is all right. If you are going to pick out certain things, then they should be read into the record. Then that gives the other side the opportunity of offering the remainder.

Mr. Bronson: Yes. And it does not cover the matter of any objections that we might make, which were reserved at the time we were taking the depositions.

The Court: That has to be taken up in open court. I would not sit here and go over this with you, as I indicated just before, unless I have the waiver.

Mr. E. B. Stanton: Perhaps I can just proceed and read into the record the portions I suggested, then, Mr. Bronson.

The Court: That is just what I said. If there are going to be portions and they are not read, it doesn't do me a bit of good.

Mr. E. B. Stanton: Starting at page 156 of the second volume.

Mr. Bronson: Will you refer to it by line?

Mr. E. B. Stanton: My copy does not have lines indicated. [348]

Mr. Bronson: Neither does mine. What is the location on the page?

Mr. E. B. Stanton: About the middle of the page.

"Q. What was Mr. C. W. Metcalf's position with your company in May, June, July, and, say, in August of 1946?

"A. He was a consultant. He advised principally on matters concerning the purchase of certain types of materials.

"Q. Had he any authority to act?

"A. So far as I know, he had no authority to act, except such authority as was given him in particular situations.

"Q. From time to time?

"A. From time to time. That is correct."

Referring to page 157:

"Q. When did you first learn of the transaction, with regard to glucose, between Schenley and Engraw or Whipple?

"A. My best recollection is that I first learned of a transaction with Mr. Whipple on June 5, 1946.

"Q. And from whom did you learn that fact?

"A. Mr. Matcalf.

“Q. Was Mr. Metcalf at that time in New York? A. He was. [349]

“Q. And what did he tell you about it?

“A. I refuse to state, because he came to get my legal opinion on the situation.

“Q. Was he a full-time employee of Schenley at that time, or a regular employee? I will put it that way—was he a regular employee?

“A. I would not call him a regular or full-time employee, and he did not participate in any of the benefits, by way of compensation and otherwise, that were available to full-time or regular employees. He was a consultant. My recollection is that he also had some outside business interests of his own, which he carried on at the same time.

“Q. Will you tell us what Mr. Metcalf’s authority was as regards the glucose transactions involved in this case ?

“A. So far as I know, his authority was solely that of a consultant, and adviser in connection with the transactions. He had no authority either to purchase this or any other glucose, nor did he have authority to enter into any agreement concerning this transaction.

“Q. I show you Plaintiff’s Exhibit 18-N, which is a wire from Metcalf to Donnelly. Was that telegram sent in connection with his duties as adviser or consultant? [350]

“A. I would say that it is clear from the telegram itself that he is asking for details and information; and, if my recollection is correct, there

is another memorandum in which he sets forth what his purpose may have been, and that is the memorandum of June 3rd from Mr. Metcalf to Mr. Kiefer.” [351]

Mr. Bronson: May I interrupt you a minute. You already introduced into evidence both of those documents. Otherwise your reading of it will have no significance.

Mr. E. B. Stanton: I am not sure which one we did put in, Mr. Bronson.

Mr. Bronson: I am not either.

Mr. L. B. Stanton: What were the numbers?

Mr. E. B. Stanton: 18-N.

Mr. L. B. Stanton: I don't believe 18-N went in.

Mr. E. B. Stanton: I don't care about introducing it.

Mr. Bronson: All right, pass it.

Mr. E. B. Stanton: Starting now on page 159, at the bottom of the page:

“Q. Have you any knowledge of the request to the New York office of Schenley for the issuance of a letter of credit in this transaction?

“A. No, sir.

“Q. You say you have no knowledge?

“A. That is right.

“Q. Do you know whether or not the New York office refused to issue such letter of credit to cover this glucose?

“A. You mean refused somebody's request to issue the letters?

“Q. Yes. [352]

“A. There was a request that came from Engraw, which was refused.

“Q. You are now referring to a communication addressed to Schenley from Engraw, are you?

“A. That is correct, sir.

“Q. Are you referring to cable, Plaintiff’s Exhibit 26-N, addressed to Cincinnati?

“A. Yes, that was the cable I have in mind.”

Mr. L. B. Stanton: That is 26-N.

Mr. E. B. Stanton: 26-N is in evidence.

Mr. Bronson: Is it?

Mr. E. B. Stanton: Yes, that is in evidence now. That is Plaintiff’s Exhibit 27. When referring to it as 32-N in the deposition, he referred to Plaintiff’s Exhibit 27.

“Also, the cable which is marked Exhibit 32-N.”

32-N for the record is Plaintiff’s Exhibit 28.

“Q. That was likewise addressed to Cincinnati, was it not? A. That is correct.

“Q. Do you know of any telephone call from Cincinnati to your New York office asking that the New York office arrange for the issuance of a letter of credit? A. I do not.

“Q. You had not been asked with reference to that, with reference to issuing a letter of credit at that time? [353]

“A. I received no request to issue a letter of credit.

“Q. If such a request had been made, to whom would it be addressed in your organization in New York?

“A. The actual details of issuing a letter of credit would be handled with the bank, if handled in normal course, by the treasury department. A request might have been received by the New York office through any one of a number of channels, depending upon who was making the request for the issuance of the letter of credit.

“Q. To whom would it be submitted for approval?

“A. It would finally have to be approved by an executive officer of the company.

“Q. You?           A. No, sir.

“Q. You mean any one of a number of executive officers?

“A. I would answer that question in this way, that the treasurer of the company would proceed to secure the final issuance of the letter of credit, if he were entrusted to do so by any one of a number of officers of the company; but no officer of the company would authorize the issuance of the letter unless he were personally familiar with all of the details of the transaction or familiarized himself with them by communication [354] with other officers of the company.

“Q. Who was the first one in your New York office, then, to whom the glucose transaction which is involved in this case was submitted?

“A. I am unable to state. I believe that the first officer in the New York office to whom attention the matter came was Mr. Seskis, who is a vice-president of the company, but I am not certain of that.



“Q. Did Mr. Seskis discuss this matter with you?

“A. So far as I know, no request was ever made to Mr. Seskis to issue a letter of credit in this transaction.

“Q. Who was the first one to call your attention to this glucose transaction?

“A. Mr. Metcalf.

“Q. And was that the conversation of June 5th, did you say?

“A. Yes, June 5th, to my best recollection.

“Q. And that is the conversation, the substance of which you decline to give?

“A. That is correct,—almost directly after the first conversation.

“Q. And what was the substance of that conversation?

“A. I decline to state. [355]

“Mr. Pickett: Will you state for the record why?

“The Witness: Because I consider it a privileged and confidential communication.

“Q. Woolsey was assistant secretary, wasn't he, of the company at that time?

“A. Yes, Woolsey was an assistant secretary of the company at that time.

“Q. I show you a copy of a telegram addressed to Harold A. Whipple and signed Schenley Distillers Corporation by ‘Jas. E. Woolsey, assistant secretary,’ marked Plaintiff's Exhibit 31-N and ask you whether you know of the sending of this telegram by Mr. Woolsey.”

That is in evidence under Plaintiff's Exhibit No. 13.

Mr. E. B. Stanton (Reading) :

"A. Yes, I knew it was being sent.

"Q. You knew it was being sent?

"A. That is correct, sir.

"Q. Did you direct him to send it?

"A. May I state the circumstances?

"Q. Certainly.

"A. Mr. Woolsey told me of a conversation that he had had with Mr. Whipple and stated that Mr. Whipple had requested that Mr. Woolsey confirm to him, by writing, what Mr. Woolsey told him in the conversation. I told [356] Mr. Woolsey that I saw no objection to confirming it, in fact, I thought it was advisable to do so.

Q. Did you authorize the telephone conversation or the telephone notice on the part of Woolsey which this telegram confirmed?

"A. I transmitted it, but did not authorize it.

"Q. I don't quite understand your answer.

"A. I don't mean to quibble, but I did not make the decision to give that notice to Mr. Whipple. That decision was made elsewhere in the company. I was told about it and instructed Mr. Woolsey to communicate with Mr. Whipple.

"Q. Who made that decision?

"A. To the best of my recollection, Mr. Kiefer.

"Q. Of Cincinnati?

"A. Mr. Kiefer spent most of his time in Cincinnati.

“Q. And what is Mr. Kiefer’s position with the company?

“A. Mr. Kiefer is a vice-president in charge of the production department, of which the purchasing department is a division.

“Q. And it was Mr. Kiefer’s decision that this statement should be made to Mr. Whipple on behalf of the Schenley Company?

“A. It was Mr. Kiefer’s decision that we would not [357] go further with the purchase and, as I stated, I then told Mr. Woolsey to communicate that decision to Mr. Whipple.

“Q. Did Mr. Kiefer ask your advice as to whether or not that communication should be sent to Mr. Whipple, or did you merely follow his instructions to do so?

“A. No. My best recollection is that Mr. Kiefer had made his decision and then discussed with me my opinion as to the procedure to be followed.

“Q. The procedure you are referring to is as to the method of notifying Whipple or Engraw of his decision?

“A. My recollection is when that decision was made we had already received a cable from Engraw, in which reference was made to contracts and to cancellation and to penalties, and Mr. Kiefer naturally sought my opinion in connection with the transaction, and the steps to be taken in it, and I gave him my advice as to the steps to be taken, because it was perfectly apparent that the parties were in a dispute.”

Referring now to page 168:

“Q. Do you know Emanuel R. Dichter?

“A. I know who he is. I have never met him.

“Q. Wasn’t he an employee of Schenley, attached to your New York office? [358]

“A. I don’t know, at the moment, whether he was employed generally, or specially employed. I can find out easily enough. But, in either event, he performed some service for Schenley over a relatively short period of time, and in South America.

“Q. You know, of course, that Metcalf sent Mr. Dichter to Buenos Aires?

“A. I do know that, yes.

“Q. Did you tell him to?

“A. No, I did not.

“Q. Do you know of a time he telephoned to Dichter at Rio to go to Buenos Aires?

“A. I knew that he was going to send Mr. Dichter from Brazil to the Argentine.

“Q. Did you authorize him to do so?

“A. I did not authorize him to do so, no.

“Q. Did he act on his own authority in doing it? A. I can’t answer that question.

“Q. But he did talk to you before he telephoned Mr. Dichter at Brazil?

“A. That is correct.”

Now, on page 186, about the middle of the page:

“Q. Who finally decided to refuse to go on with the purchase? [359]

“A. My best recollection is that it was Mr. Kiefer.

“Q. And he had full authority to so decide?

“A. He did.”

And on page 195:

“Q. Mr. Heymsfeld, you were asked about a telephone conversation which you had with Mr. Woolsey on June 6, 1946, specifically as to instructions which you gave to Mr. Woolsey to be communicated to Mr. Donnelly. Confining yourself to that subject, will you state what you told Mr. Woolsey about it?

“A. As I have testified, I did not tell Mr. Woolsey to instruct Mr. Donnelly not to do anything further in the matter. I did tell Mr. Woolsey that the matter had been referred to the legal department and for him to make sure that no one in the company's employ on the Coast took any steps in the matter without clearing with him and, in turn, with me.”

Mr. E. B. Stanton: I now want to introduce from the depositions certain exhibits, the gravaman of which I believe has all been admitted by the defendants.

First referring to Plaintiff's Exhibit 40-N, being a letter on the stationery of Schenley Affiliates to Mr. R. T. Heymsfeld, from Jas. A. Woolsey, signed Jas. E. Woolsey.

Mr. Bronson: Just give us a moment, will you, to locate these, if you will? 40-N, is that the number of it? [360]

Mr. E. B. Stanton: 40-N.

The Clerk: Is this admitted? Do you want to see it?

Mr. Bronson: No objection to it.

The Court: If there is no objection, it may be

received. I will not stop now to read it.

The Clerk: It is PLAINTIFF'S EXHIBIT 51 in evidence.

“Schenley Affiliates Inter-Office Communication  
Compliance Department—California

To: Mr. R. T. Heymsfeld—New York,

Date—June 7, 1946

cc: Messrs. J. B. Donnelly, C. J. Kiefer

From: Jas. E. Woolsey—San Francisco

Subject: Schenley—CIA Engraw Comercial &  
Industrial S. A.—Argentine Glucose

“Today I sent Harold A. Whipple the following wire which is self-explanatory:

“Following our telephone conversation of yesterday, and in response to your request that said conversation be confirmed in writing, we advise that we are not entering into any agreement with CIA Engraw Comercial & Industrial SA for the purchase of glucose.

SCHENLEY DISTILLERS  
CORPORATION

By: JAS. E. WOOLSEY [361]

Assistant Secretary.

“I shall keep you advised of further developments.

JAS. E. WOOLSEY.”

JW:VM

Mr. E. B. Stanton: Next referring to the exhibit in the deposition, to Plaintiff's Exhibit 30-N, for identification, being a Memo of telephone conversation with Harold A. Whipple, June 6, 1946, by Jas. E. Woolsey.



The Clerk: Plaintiff's Exhibit 52 in evidence.

The Court: It is admitted. [362]

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### PLAINTIFF'S EXHIBIT 52

#### Memo of Telephone Conversation With Harold A. Whipple—June 6, 1946

Shortly after 2:00 this afternoon, I succeeded in getting Whipple on the telephone and told him I was calling for Schenley Distillers Corporation to advise him that Schenley would not enter into the contract with Engraw, to purchase Argentine glucose.

Whipple said that I meant that I was repudiating, on behalf of Schenley, the contract completed by the letter on Schenley letterhead signed by Donnelly and dated May 23. I answered that Schenley's position in the matter was that there was no contract between Schenley and Engraw; that the parties to the proposed contract had never agreed upon specifications; that Schenley had never issued any purchase order, and that Schenley had not put up the letter of credit, and that, in our opinion, there was no contract and that I was phoning him this information to Engraw.

He said that there was damage; that he had acted in good faith upon the written word of a Schenley official on Schenley letterhead. I told him Donnelly was not an official of Schenley. He said he supposed Schenley could go into court and claim that Donnelly was not an [363] official and had no authority to commit Schenley. I told him that our position

was that we had not ~~expected~~ (Written in ink 'approved') samples; that we had not issued any purchase order; (in ink on margin 'that we had not furnished or agreed upon specifications') and had not put up any letter of credit, and that there was no contract as far as we were concerned.

"He asked me to state in writing that we were repudiating the deal and give our reasons for doing so. I told him that I would transmit his request to the proper person. He again repeated that he had acted in good faith on Donnelly's letter of May 23 and that now he had been advised, presumably by one of Schenley's lawyers, that Schenley repudiated the contract made by Mr. Donnelly. I said that I was a member of the Law Department.

"He said that he had forwarded to Many Blanc, Chicago, yesterday, a part of a sample that he had of the product; that he had gone to a lot of trouble and great expenses in the negotiation; that he 'smelled a rat' in the deal when Schenley had requested a sample; that undoubtedly Schenley was trying to deal directly in the Argentine market and cut someone out of a commission that had been earned. I again told him that our position was that there was no contract and cited the [364] reasons given before. He repeated his request that Schenley notify him in writing, and I again told him that I would pass the request on to the proper persons. He asked that Schenleys' reasons for repudiation be given in its written notice that it had repudiated the contract.

JAS. E. WOOLSEY."

Mr. E. B. Stanton: Next from the deposition, Plaintiff's Exhibit 29-N for identification, being a telegram to Many, Blanc & Co., Inc., dated June 6th, 1946, signed Jas. E. Woolsey.

The Clerk: Plaintiff's Exhibit 53 in evidence.

Mr. Bronson: We make the objection, for the record, that the termination of negotiations had been effected at the time, at least by the verbal communication from Mr. Woolsey to Mr. Whipple. The Court hasn't any idea of the——

Mr. E. B. Stanton: I wish to be heard on that, your Honor.

The Court: All right, gentlemen, what is it?

Mr. E. B. Stanton: That telegram is significant and important to our case, for this reason, your Honor. It tends to show the bad faith with which the Schenley organization was acting in this matter. Now, if you will recall, there is in evidence the fact that Mr. Whipple was instructed by the Schenley Company to send this sample to Many, Blanc. Now, [365] if you will recall, there is in evidence the fact that Mr. Whipple was instructed by the Schenley Company to send this sample to Many, Blanc. Now, on the same date as that telegram indicates, the Schenley Company wired Many, Blanc that the sample was coming and when it came, to disregard it. And yet, they have set up here that one of their defenses is that they had no sample. Yet, when a sample is being sent, at the same time they wire the place where the sample is being sent, to disregard that sample and not examine it or take any steps on it.

The Court: Well, you are reading a lot into it that is not in there. I am sorry. It says, "Sample of Argentine glucose being sent to you by Harold A. Whipple Co., Los Angeles. Do not take any action"—Now, unless I understand that was sent to Many Blanc Company for the purpose of analysis, then I cannot take those words as meaning do not take any action or have any further correspondence whatever regarding this sample at any time, I cannot read those words into it, as you are trying to read them in.

Mr. E. B. Stanton: Well, I think it is a fair interpretation, if you tell a man "Do not take any action" it certainly means do not proceed with the analysis.

The Court: Were these people chemists?

Mr. E. B. Stanton: These were the chemists. If you recall the exhibit, Mr. Whipple sent a letter to Many Blanc [366] with a sample. He sent a carbon copy to Mr. Baglin, that he had sent the telegram to Many Blanc. Now, this is a telegram from Schenley Company telling Many Blanc not to take any action on the sample, yet they are the ones that told Mr. Whipple to send a sample to them.

The Court: I will overrule the objection, but I just want to emphasize the fact that the words of the telegram do not necessarily mean——

Mr. E. B. Stanton: Well, I appreciate that I am putting my own interpretation on it, your Honor. The telegram, after all, speaks for itself.

The Court (Continuing): —anything except what they mean on their face, unless, of course, by reference to other facts, which, of course, is a matter of argument. I will overrule the objection. It bears on the sample regardless of interpretation that I put on it, and my only object in calling your attention to it is merely to say that I think it bears on it without agreeing with you at this time as to your interpretation.

Mr. E. B. Stanton: I may have been giving the telegram a liberal construction.

The Court: Well, that is all right. In other words, I admit the exhibit without the argument in support of it.

Mr. E. B. Stanton: Thank you, your Honor.

The Court: All right, it may be received and the [367] objection is overruled.

The Clerk: PLAINTIFF'S EXHIBIT 53 in evidence.

“Western Union

Many, Blanc & Co., Inc.

3414 W. 48th Place

Chicago, Illinois

June 6, 1946

12:05 p.m.

Attention: Mr. Bayles

Sample of Argentine glucose being sent to you by Harold A. Whipple Co., Los Angeles. Do not take any action or have any correspondence whatever regarding this sample at any time.

JAS. E. WOOLSEY.”



Mr. E. B. Stanton: I now offer from the deposition Plaintiff's Exhibit 22-N, a memorandum or letter on the stationery of Schenley Affiliates to Mr. Chas. Metcalf from Carl J. Kiefer, Subject: Argentine Glucose, dated May 29, 1946, signed Carl J. Kiefer.

The Clerk: Is this admitted also, your Honor?

The Court: Yes.

The Clerk: Plaintiff's Exhibit 54 in evidence.

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PLAINTIFF'S EXHIBIT 54

"Schenley Affiliates

To: Mr. Chas Metcalf

CC-Mr. I. J. Seskis

Date May 29th, 1946

From: Carl J. Kiefer

Subject: Argentine Glucose

Branch Office Cincinnati

File K-5/29-14

You 'phoned me today that you had contacted Donnelly in San Francisco relative to this matter and I advised you that I had written to me, Seskis to handle the same. Therefore, in order to uncross these varoois wires I am sending both you and Mr. Seskis copy of Donnelly's letter to me on the subject so that you can proceed as per my precious letter to Mr. Seskis.

I await your further advice.

CARL J. KIEFER.

CJK:DW

Encl." [369]



Mr. E. B. Stanton: I next offer from the deposition Plaintiff's Exhibit 25-N for identification, being on the letterhead of Schenley Affiliates, a letter date June 3, 1946, to C. J. Kiefer from C. W. Metcalf.

The Clerk: Your Honor, are all these deemed to be admitted unless they are objected to?

The Court: Yes, when there is no objection, they are to be received.

The Clerk: Plaintiff's Exhibit 55 in evidence.

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PLAINTIFF'S EXHIBIT 55

"Schenley Affiliates  
Inter-Company Communication

Date June 3, 1946

New York Office

To: Mr. C. J. Kiefer

cc-Mr. I. J. Seskis

From: C. W. Metcalf

Subject:

The wires are not crossed as far as I am concerned regarding your purchase of 1,135 tons of Argentine glucose. Mr. Gusky came down and said that he understood that we had bought glucose for shipment from the Argentine, that if the rumor was true that he had some space for June that was available and would I please find out what the situation was. I wired Mr. Donally for the information. The telegram that I received back was not clear, therefore, I called Mr. R. H. Paglin on the tele-

phone. [370] When I talked with you over the telephone on Tuesday, you asked me to check on the sellers of this material, which I attempted to do.

The above completely covers my interest in this transaction.

This is for the records.

CWM.

CWM:MB'' [371]

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Mr. E. B. Stanton: I now introduce from the deposition Plaintiff's Exhibit 15-N for identification, being a copy of a wire.

Mr. Bronson: Now, wait a minute, if you will. You are going a little too fast for me. Before you start discussing it, would you mind giving me a moment to examine it and find out——

Mr. E. B. Stanton: Certainly, 15-N.

Mr. Bronson: Okay.

Mr. E. B. Stanton: 15-N being a copy of a wire to Carl J. Kiefer, Schenley Distillers Corporation, on May 21, signed J. B. Donnelly.

The Clerk: No objection? Plaintiff's Exhibit 56 in evidence.

## PLAINTIFF'S EXHIBIT 56

Western Union

WU B127 Ser

Sanfrancisco Calif May 21 1025A

Carl J. Kiefer

Schenley Distillers Corp

Importer expects a cable reply from Argentina tomorrow on glucose. It is possible we can obtain full 1300 tone with deliveries at rate of 100 tons a month at start. This represents almost \$600,000. Will call you tomorrow regarding necessary budget for purchase of this commodity. [372]

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Mr. E. B. Stanton: I now offer from the Heymsfeld deposition Plaintiff's Exhibit 12-M for identification, being a memorandum to C. Balzer from R. H. Baglin, subject Argentine glucose, signed R. H. Baglin.

The Clerk: Plaintiff's Exhibit 57 in evidence.

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## PLAINTIFF'S EXHIBIT 57

May 20, 1946

JBD

San Francisco

B520-S

"Mr. C. Balzer

R. H. Baglin

Argentine Glucose

"I believe the purchase of the Argentine glucose is materializing. Mr. Kiefer has approved our

purchasing up to 1,000 tons. This quantity would be shipped from the Argentine between June and December. The shipments through September are likely to be confined to 50 tons or better a month.

The Argentine shipper is being cabled today to ascertain definitely that the glucose is available. Possibly by Wednesday of this week we can give you something as to whether or not the deal is going through.

R. H. BAGLIN.

RHB:SR [373]

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Mr. E. B. Stanton: I next offer from the Heymsfeld deposition Plaintiff's Exhibit 17-N for identification, being a letter or memorandum on the stationery of Schenley Affiliates to Carl J. Kiefer from J. B. Donnelly, subject Argentine glucose, dated May 23, 1946, consisting of a three page letter, bearing the signature on the last page, J. B. Donnelly, together with and attached to this letter a copy of the letter from Donnelly to Whipple dated May 23, 1946.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 58 in evidence.

The Court: All right.

## PLAINTIFF'S EXHIBIT 58

"Schenley Affiliates

Date May 23, 1946

Branch Office San Francisco

File D523-18

To: Mr. Carl J. Kiefer

Arom: J. B. Donnelly

This will confirm our conversation of yesterday. We have been advised by the Harold A. Whipple Co., importers and exporters acting as agents for Cia. Engraw Comercial & Industrial S.A., that 600 tons of glucose is available for shipment at the rate of 150 tons a month starting in July and ending in October. Further, they believe an additional 700 tons will be made available for delivery in the last quarter of this year.

Mr. Whipple received a cable from Engraw as follows: [374]

'Six hundred tons available price 1.375 (pesos per kilo) confirmed credit our order delivery hundred fifty tons monthly starting July. Answer today. Will endeavor to secure balance if you confirm.  
/s/ENGRAW.'

---

Mr. Whipple replied by cable as follows:

'Accept 600 tons one thirty seven one half. Shipments one hundred fifty monthly. Will accept balance as available same price. Schenley Distillers will open credit entire amount. Try ship during June. Cable confirmation. Signed Whipple.'

Mr. Whipple advises us he will notify us just as soon as he receives a reply. He hopes that they will be able to handle the balance during the last quarter of the year.

We have been given a breakdown of the price as follows:

'The export exchange rate on Argentine pesos is U. S. \$100.00—335.82 pesos or U. S. \$0.29778 per peso.

At 1.375 pesos per kilogram—or U. S. \$0.4094575 per kg.—(one kg.—2.2046 lb.)—\$0.18573 per lb.

Freight rate is \$25 per 40 cu. ft.; the barrels contain slightly less than 15 cu. ft. with a net content of apprx. 660 lbs., or the equivalent of apprx. 0.0142 per lb. Insurance 1½% 30c per 100 lbs. .0030 per lb. Duty —2c per lb. .02; giving a landed cost est. 0.22293 per lb." [376]

"The letter of credit should be opened in favor of: Cia. Engraw Comercial & Industrial S. A.

San Martin 329

Buenos Aires

through the First National Bank of Boston, Buenos Aires, by cable, covering the full amount in pesos at 1.375 pesos per kilo. net, f.o.b. steamer, Buenos Aires; expiration October 30, 1946, or as confirmed."

Mr. Whipple further advised us that the 335.83 pesos per U. S. \$100 is a pegged rate for export and is therefore not subject to fluctuation. This means that the only variation in price that can occur will be in the freight rate, where there may



be a slight difference. However, in no case will the price be higher than 22.3 cents a lb. The McCormick Steamship Co. will be the carrier. While Engraw wishes the letter of credit to be placed through the First National Bank of Boston in Buenos Aires, this may have to be changed depending upon the arrangements made by our New York bank. If there is to be a change in banking connections, I would appreciate hearing from you as soon as possible so that I can notify Mr. Whipple.

In addition to the above, Mr. Whipple advises me that Engraw has indicated they will be in a position after January 1st to furnish from 300 to 500 tons monthly at the then prevailing market price for glucose. I would like a word from [376-A] you as to whether we care to book any of the production for 1947 as outlined. We will discuss this further with Mr. Whipple, and attempt to arrange a hold on the 1947 product pending examination of the glucose. In any case, I will keep you informed if Engraw or Whipple try to pull a rush act on us for the 1947 production, although I will accept the additional 700 tons of 1946 material if it can be made available.

We have been advised by Engraw, through Whipple, that the quality of this glucose is pure corn syrup, crystal clear, testing 43 to 45 Baume. A sample is expected by air express within the next few days.

I believe that documents to accompany draft under letter of credit should include a certificate of

analysis, as well as a certificate of inspection of cooerage at time of loading, for your own quality control and for insurance purposes.

We believe there are two possible methods of handling the mechanics of purchasing this material, and because of the size of the order we favor the first.

The first method is as follows: We will advise Whipple, by letter, of acceptance of the 600 tons at the price quoted, for further transmission to Engraw. Del Eberts can then prepare in Cincinnati the necessary purchase orders for direct transmittal to Engraw in Buenos Aires, and at the same time arrange for the letter of credit through our [376-B] New York bank to cover this purchase. It can be stated on the purchase order that all further communication with regard to the shipment is to be directed to the San Francisco office, and we will follow up on all further details.

The second method would be to have our West Coast Purchasing Department issue the purchase order, with copy to Cincinnati. You or Del Eberts could then arrange for the proper letter of credit to be issued from New York to cover the purchase.

I believe the information contained herein is sufficient to issue the purchase order. I would appreciate your advising me if you intend to have Del follow through on this.

We have written a letter of acceptance to Mr.

Whipple, copy of which is attached for your information.

Regards,

/s/ J. B. D.

J. B. DONNELLY.

JBD:LP

enc.

P.S. Since dictating the above, we have received advice from Mr. Whipple that Engraw can now deliver to us 1135 tons, shipped as follows:

June 50 tons, July 60 tons, Aug.-Sept. 200 tons, September 150 tons, [376-C] October 275 tons, November 200 tons, December 200 tons

provided that the letter of credit covers the entire 1135 tons. We therefore have changed our letter of acceptance accordingly.

J.B.D.

bc Mr. C. J. Kiefer

May 23, 1946

Harold A. Whipple Co.

316 Commercial Street

Los Angeles 12, California

Attention: Mr. H. A. Whipple

Gentlemen:

This will confirm our telephone conversation and your letter of May 21st.

We hereby acknowledge the offer of Cia. Engraw Commercial & Industrial S. A., of 600 tons of glucose made from pure corn syrup, crystal clear, and testing between 43 and 45 Baume, at a price of 1.375 pesos per kilogram. The price listed is f.o.b.

steamer, Buenos Aires, packaged in wood cooperage containing approximately 660 pounds each. Shipment is to be made via McCormick Steamship Co. to San [376-D] Francisco or Los Angeles.

A purchase order will be sent to Cia. Engraw Comercial & Industrial S. A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos. Expiration date will be October 30, 1946, or as confirmed. Shipment of this material is to be at a rate of 150 tons a month.

All correspondence will be handled via air mail instead of regular mail, in order to speed this matter.

Very truly yours,

SCHENLEY DISTILLERS  
CORPORATION,  
J. P. DONNELLY.

JBD:LP

P.S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial S. A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; September—150; October—275; November—200; December—200. The conditions of acceptance of this quantity are the same as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing.

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Mr. E. B. Stanton: I next introduce in evidence

the interrogatories and answers to said interrogatories which were directed to Jas. E. Woolsey which the clerk has in the file, I presume.

The Court: All right.

The Court: All right. Now, gentlemen, there was some question as to whether you were going to make some objections, Mr. Bronson.

Mr. Bronson: Yes. I am not prepared on that.

Mr. Rowe: No, no. We did not know what was going to be done about this. I think perhaps if we adjourn now and discuss with Mr. Stanton exactly what he expects to introduce in this fashion, we can arrange our objections, so we can go along.

The Court: Other than the interrogatories, have you anything further?

Mr. E. B. Stanton: Other than the interrogatories I have nothing else at this time except the South American deposition which we intend to go into after the noon recess.

Mr. Rowe: May I suggest that we pass the Woolsey interrogatories and adjourn at this time, your Honor? We will look them over during the noon hour.

Mr. E. B. Stanton: My intention is, of course, to offer the Woolsey interrogatories in full, of course subject to any objection. [377]

Mr. Rowe: I suggest, your Honor, that we adjourn at this time. It will take us, of course, a little while to look them over, but frankly we did not know whether they were going to be used or not.

The Court: Will that conclude your presentation?



Mr. E. B. Stanton: I believe so, except as I said, the South American depositions.

The Court: I mean you have no other oral witnesses?

Mr. E. B. Stanton: No other oral witnesses.

The Court: Gentlemen, I was just trying to anticipate how things are. What form will your testimony take? Have you any witness or will they all be by depositions?

Mr. Bronson: We have two witnesses who will testify orally.

The Court: Yes.

Mr. Bronson: And then we have depositions we are putting in. We have some that are here from South America and some that are not yet here, to be received, those that were taken on letters interrogatory, so that I think, your Honor, the case will have to be deferred for some indefinite period, that is, the closing of it.

Mr. E. B. Stanton: In that respect, your Honor, I thought we may as well bring up at this point one problem that we have. We have one witness from South America whom we [378] consider solely for the purpose of being a rebuttal witness to these depositions. Of course, we are aware, to a certain degree, of the answers in these depositions, that is the proposed answers to the depositions, but this witness is arriving in Los Angeles from South America Wednesday. Of course, I don't expect that their depositions will arrive from South America until sometime after that, but I thought



that, if possible, we could set a time for the hearing of this rebuttal witness, even though it is in advance, perhaps, or a bit out of order.

The Court: Well, it all depends, gentlemen, on when you conclude. As you know, my cases follow one after another. Let us see what we have. Let me see what cases I have to try next week. I am calling cases for setting and I may set some immediately.

Mr. E. B. Stanton: I will be willing to stipulate that rather than take the time to open court, if Mr. Bronson and Mr. Rowe will stipulate, when this man arrives in Los Angeles we can take his deposition.

The Court: Well, we can arrange it probably for later in the week. I don't know whether Mr. Bronson and Mr. Rowe will want to stay over indefinitely.

I intend to take this week end, gentlemen, to bring myself up to date. I have studied the exhibits as we went along, but, with so many depositions in, I intend to read [379] them and bring myself up to date as far as I can, because even if there is anything left of the case, if the case is kept open for further proceedings, it is well that I know everything that is in the record up to the time the additional testimony is brought in. I have no objection to making an arrangement to hear this witness out of order, in open court, sometime next week.

Mr. E. B. Stanton: Well, his telegram states

that "Just arrived. Will be in Los Angeles June 9th."

The Court: I think we better adjourn until 1:30 and I think if I get on the job in between, there is no danger of my conferences running over. I got here at a quarter to nine this morning but I was in conference with one of the Judges and he did not look at the clock and neither did I, so if I get on the bench in between, there is no chance of anybody breaking in, because if I am on the bench I won't be interrupted, so I think we can continue this until 1:30, and it may well be that we can complete this, this afternoon. Is there any reason why we can't, with only two witnesses?

Mr. Bronson: The only thing is, Judge, we have been rather pressed with matters concerning this case and perhaps we do not work quite as rapidly as your Honor does, but the fact of the matter is that we have not prepared ourselves yet fully on our side to make the objections that you require, as they are submitted, to these South American depositions [380] taken by plaintiff. You remember you suggested that we be prepared to read them and make objections. [381]

The Court: The point is this: If they are offered in their entirety, then you can just go down the line of the objections, just pick out the objections and raise them.

Mr. Bronson: Yes; but you want us to do that *vive voce* here in court, and I say we are not quite prepared. We could do that before the week-end passed.

Mr. L. B. Stanton: I think that is a little bit out of order, Mr. Bronson. You have had these depositions——

Mr. Bronson: That is right.

Mr. L. B. Stanton: ——pretty near six months now.

The Court: I will decide that. I am not trying to rush you gentlemen. I try to economize the time, and it might well be that the depositions may be offered and then we will hear the oral testimony and your depositions, and then when we are through with all the oral testimony we can take up the objections to the depositions. While ultimately objections to depositions conform to a pattern, to an idea——

Mr. Bronson: That is right.

The Court: ——you know exactly what you want.

Mr. Bronson: We have gotten about halfway through and I was going to say, I am sure we will be ready tomorrow morning so that you can close then with those objections fully. [382]

The Court: We will see how we go this afternoon. I do not want to continue the case and not hear the defense before the objections. There is the difficulty. I do not like them out of order in that manner. The more so as I enunciated what I considered to be the liberal rule that objections, unless they really go to the essence of a case or of a defense, objections to evidence amount to very little.

Very well. Let us take adjournment until 1:30

and then we will see how far we get this afternoon and what to do about it. All right; 1:30.

(Whereupon, a recess was taken until 1:30 p.m. of the same day, Thursday, June 3, 1948.)

Thursday, June 3, 1948, 1:30 P.M.

Mr. Rowe: May it please the court, I believe at the time of adjournment the plaintiff had just offered in evidence the answers of Mr. Woolsey to certain interrogatories propounded to him by the plaintiff.

The Court: I don't think we got that far.

Mr. E. B. Stanton: We have not got to the offer yet.

Mr. Rowe: You had not?

The Court: No. We started in and then we got to talking about it, and it did not occur to me until after I left the bench that I had broken in right in the middle and that the offer had not been completed. So we will start all over again now. I was just directing the clerk to find the interrogatories for me so that I could follow them. We have built so voluminous a file, gentlemen, that it is hard to find just where things are.

Mr. L. B. Stanton: We have been getting a little experience with Federal rules of discovery.

The Court: This is off the record:

(Brief comment off the record.)

Mr. E. B. Stanton: I am offering the questions and answers addressed by written interrogatories to James Woolsey.

The Clerk: A separate exhibits? [384]

Mr. E. B. Stanton: I am offering as one exhibit the questions and answers thereto.

The Clerk: They are separate documents.

The Court: Mark them as one exhibit and give them subdivision numbers A and B. They should be together because they relate to the same matter. Years ago we used to have the habit of having them consolidated in the answer, but I notice modern notaries do not do that any more. When I practiced law, which is a good many years ago, we used to consolidate the questions into the answers in one document, and then you knew when you were in court the judge could see it right before him, otherwise he has to keep two documents in front of him.

Mr. E. B. Stanton: Mr. Rowe has informed me on behalf of the defendant that they have no objection to the interrogatories alone.

The Clerk: The interrogatories are marked as Plaintiff's 59 in evidence; the answers to the interrogatories are marked Plaintiff's Exhibit 59-A in evidence.

The Court: Now, gentlemen, before I rule on the other, I understand there is no objection to the interrogatories because those were settled. Have you any objections to the answers given?

Mr. Rowe: No, your Honor. As a matter of fact those were not interrogatories which were settled by the court. [385] They were handled, I think, on the theory of interrogatories addressed directly to a defendant, and in answering the interrogatories

we interposed our objections to the interrogatories, and then when we felt that we should answer, we did answer. And in the form in which we have prepared the answers to plaintiff's interrogatories we have no objection to that answer being received into evidence.

The Court: It was on requests for admissions?

Mr. Rowe: Well, it was not exactly. It was more interrogatories than requests.

The Court: All right, gentlemen. Then they will be received into evidence. I won't take the time to read them now, so you can go on with the other.

The Clerk: Plaintiff's Exhibit 59 and 59-A in evidence.

The Court: They may be so received.

(PLAINTIFF'S EXHIBITS 59 AND 59-A  
are in the following words and figures, to-wit:)

“Stanton & Stanton  
740 South Broadway  
Suite 1004-09  
Los Angeles 14, California  
Phone: TRinity 3266  
Attorneys for Plaintiff



## Plaintiff's Exhibit 59—(Continued)

In the District Court of the United States for the  
Southern District of California Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E. INDUSTRIAL S. A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a  
corporation,

Defendant.

Interrogatories Addressed to Jas. E. Woolsey

The following written interrogatories herein are addressed to Jas. E. Woolsey, as assistant secretary of the defendant in said action, under the terms of Rule 33 of Federal Rules of Civil Procedure. It is requested, in accordance with said rules, that each of said interrogatories be answered separately and fully in writing, under oath, and that said answers shall be signed by the party making them; that copies of said answers be delivered to the undersigned attorneys for plaintiff within fifteen (15) days after the delivery of said interrogatories.

1. Please state your name, age, occupation and residence.

2. If you have stated that you are assistant secretary of defendant corporation, please state the length of time during which you have held that position and, particularly, did you hold said posi-

Plaintiff's Exhibit 59—(Continued)

tion between the 14th day of May, 1946, and the 1st day of July, 1946? [387]

3. Between the days last mentioned, did you receive any direction, verbal or written, from any executive officer of defendant corporation with respect to a pending transaction between plaintiff and defendant, or between J. B. Donnelly and Harold A. Whipple?

4. If so, if you have stated that you did receive any such direction or directions or communications came, please state the name of the party or parties from whom such directions or communications came, the date or respective dates thereof and the contents there. Likewise give the official position and location of the office of said or each of said respective parties.

5. If you have answered the preceding question in the affirmative and any one of said orders or communications was verbal or telephonic, please state the substance thereof, and in case you have made any memorandum relating thereto, give a copy of such memorandum.

6. If any one of said communications or directions was in writing, please attach a copy of the original writing to your answer to this interrogatory.

7. Did you have a telephone conversation with [388] Ralph T. Hymesfeld, secretary of defendant corporation, on or about the 11th day of June, 1946?

## Plaintiff's Exhibit 59—(Continued)

8. If your answer to the preceding interrogatory is in the affirmative, please state if this telephone conversation constituted a report made by you to the secretary of defendant corporation of a transaction in Argentine glucose between J. B. Donnelly and Harold A. Whipple, or between plaintiff and defendant in this action.

9. Did you make a written memorandum of the substance of this telephone conversation? If so, attach a copy thereof to this deposition.

10. Did you have a telephone conversation with R. H. Baglin, Assistant in the office of J. B. Donnelly, on or about the 15th day of May, 1946, relative to glucose?

11. If your answer to the foregoing is in the affirmative, give the substance of this conversation, and if you made any memorandum of the substance of the telephone conversation, please attach a copy of said memorandum.

12. Did you have a conversation with said R. H. Baglin, either verbal or by telephone, on or about the 17th day of May, 1946, concerning glucose?

13. If your answer to the preceding interrogatory [389] is in the affirmative, please give the substance of said conversation, and if you had a written memorandum thereof please attach a copy of said written memorandum.

14. Did you have a conversation with said R. H. Baglin, either verbal or by telephone, on or about the 20th day of May, 1946, concerning glucose?

Plaintiff's Exhibit 59—(Continued)

15. If your answer to the preceding interrogatory is in the affirmative, please give the substance of said conversation, and if you had a written memorandum thereof, please attach a copy of said written memorandum.

16. Did you receive from M. B. Seasonwein, vice president of defendant corporation, a communication under date of May 28, 1946, and if you did so receive such a communication, was there attached thereto a letter from one Cooke to R. H. Baglin under date of May 21, 1946?

17. If your answer to the foregoing is in the affirmative, please attach to the answer of this interrogatory a copy of said communication.

18. Did you send to M. B. Seasonwein, on or about June 3, 1946, an answer to his memorandum or letter of May 28, 1946?

19. If your answer to the foregoing is in the affirmative, please attach copy of said answer to [390] M. B. Seasonwein.

20. On or about the 4th day of June, 1946, did you send a memorandum of written communication to R. H. Baglin?

21. If your answer is in the affirmative, please attach a copy of such written communication.

22. Did you, in any oral or written communication to R. H. Baglin, require the delivery to you of the file of R. H. Baglin concerning the Argentine glucose transaction with Harold A. Whipple Co. or plaintiff herein?

## Plaintiff's Exhibit 59—(Continued)

23. If the communication was oral or telephonic, please give the substance thereof. If it was written, or if you have a memorandum thereof, please attach a copy of such writing or memorandum.

24. Did you receive said file mentioned in the last two interrogatories from R. H. Baglin, and if so, please state what you did with it.

25. On or about the 5th day of June, 1946, did you receive from G. E. Baglin a three-page memorandum concerning the Argentine glucose transaction?

26. If your answer to this interrogatory is in the affirmative, please attach a copy of said memorandum to this deposition.

27. Did you have a telephone conversation with [391] Harold A. Whipple at Los Angeles on or about the 6th day of June, 1946?

28. If your answer to the last interrogatory is in the affirmative, please state who made the original call, whether Mr. Whipple or yourself, and the substance of that which was said by each party.

29. Did you thereafter, on or about the 7th day of June, 1946, send to Harold A. Whipple a telegram substantially as follows:

June 7, 1946

Harold A. Whipple Co.

316 Commercial Street

Los Angeles, California

Following our telephone conversation of yesterday and in response to your request that said conversa-



Plaintiff's Exhibit 59—(Continued)

tion be confirmed in writing we advise that we are not entering into any agreement with Cia, Engraw Comercial & Industrial S. A. for the purchase of glucose.

SCHENLEY DISTILLERS  
CORPORATION

By JAS. E. WOOLSEY,  
Assistant Secretary.

30. If your answer to the last interrogatory is in the affirmative, give the name of the executive officer upon whose direction you sent said telegram. In case the direction was in writing, attach hereto a copy thereof. If it was verbal or telephonic, state the date when received by you, the party [392] from whom you received it, his official position and office address, and the substance of that which was stated to you by him.

31. Did you, on or about the 6th day of June, 1946, send to Many Blanc & Co. Inc., a telegram, copy of which is as follows:

Many Blanc & Co. Inc.

3414 West 48th Place

Chicago, Illinois      Attention Mr. Bayles

Sample of Argentine glucose being sent to you by Harold A. Whipple Co. Los Angeles. Do not take any action or have any correspondence whatever regarding this sample at any time.

JAS. E. WOOLSEY

32. If your answer to the last interrogatory is



## Plaintiff's Exhibit 59—(Continued)

in the affirmative, state the name of the executive officer upon whose direction you sent said wire. In case the direction was in writing, attach hereto copy thereof. If it was oral or telephonic, state the date when received by you, the party from whom received, his office and office address and the substance of that which was stated to you by him.

33. It is noted that on each of said wires there is the notation, "C.H.S. Roma Wine Co., 582 Market Street." Will you please state the significance of that statement on each of said wires? [393]

34. Attach hereto a true and correct copy of any and all reports whatsoever which you have at any time heretofore made of your part in the transaction between defendant and plaintiff or Harold A. Whipple, whether said report is made to any officer, agent or attorney of defendant corporation.

STANTON & STANTON

By /s/ LOUIS B. STANTON"

## EXHIBIT 59-A

"Bronson, Bronson & McKinnon

1500 Mills Tower

San Francisco 4, California

Garfield 1-7200

Attorneys for Defendant.

Plaintiff's Exhibit 59-A—(Continued)

In the District Court of the United States for the  
Southern District of California Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E IN-  
DUSTRIAL S. A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a  
corporation,

Defendant.

ANSWERS OF JAS. E. WOOLSEY TO INTER-  
ROGATORIES ADDRESSED TO HIM BY  
PLAINTIFF

The answer of Jas. E. Woolsey to each of the interrogatories addressed to him by plaintiff bears the same number as the corresponding interrogatory. [394]

1. James E. Woolsey, age 43. Residence, 30 Casa Way, San Francisco, California. Occupation, Attorney-at-Law, house attorney for, and Head of Compliance Department of Schenley Distillers Corporation, San Francisco, California, Assistant Secretary of Schenley Distillers Corporation and various of its subsidiaries. I am not an executive officer of Schenley Distillers Corporation.

2. I was elected Assistant Secretary of Schenley Distillers Corporation on August 8, 1945, and

## Plaintiff's Exhibit 59-A—(Continued)

assumed the duties of such office on September 21, 1945, and I have continuously held this position since that date.

3. I did receive directions about the pending transaction between the dates May 14, 1946, and July 1, 1946, from Mr. Ralph T. Heymsfeld, who is an attorney-at-law, general counsel for Schenley Distillers Corporation and Secretary of Schenley Distillers Corporation, in his capacity as general counsel of Schenley Distillers Corporation. Mr. Heymsfeld is not an executive officer of Schenley Distillers Corporation.

4. Mr. Milton B. Seasonwein, attorney-at-law, assistant general counsel for and Assistant Secretary of Schenley Distillers Corporation, at defendant's New York Office, who is not an executive officer [395] of Schenley Distillers Corporation, on May 28, 1946, wrote me a letter.

Mr. Ralph T. Heymsfeld, general counsel, located at defendant's New York Office, communicated with me as his assistant, by telephone on June 5, 6 and 11, 1946. This last telephonic communication was confirmed in writing by Mr. Heymsfeld on June 11, 1946.

As to the contents of any of said communications, I decline to answer upon the grounds that these communications and directions were and are privileged communications between the attorneys for the defendant corporation on a legal matter.

5. The directions or communications from Mr.

Plaintiff's Exhibit 59-A—(Continued)

Heymsfeld were telephonic; those from Mr. Seasonwein were in writing. I made a brief memorandum relating to Mr. Heymsfeld's calls of June 5, 6, and 11, 1946. I have Mr. Heymsfeld's letter confirming his June 11, 1946, telephone call.

I decline to state the substance thereof or to attach copies of these documents to this deposition because the same are memoranda of privileged communications between the attorneys for the defendant corporation on legal matters.

6. I decline to attach the copies requested for the reasons stated in answer to Questions No. 4 and [396] No. 5.

7. No, not as Secretary of defendant corporation but as general counsel.

8. My answer to Question No. 7 was not in the affirmative.

9. Yes. I decline to attach a copy for the reasons stated in answer to Questions No. 4 and No. 5.

10. I have no recollection of such a conversation.

11. I can not give the substance of any such conversation and I have no memorandum of its substance.

12. I did not.

13. My answer to Question No. 12 was not in the affirmative.

14. I did not.

15. My answer to Question No. 14 was not in the affirmative.

16. I received a letter from Mr. M. B. Season-

## Plaintiff's Exhibit 59-A—(Continued)

wein, who is not a Vice-President of defendant corporation, dated May 28, 1946, attached to which was a letter dated May 21, 1946, from Cooke & Beneman, who are attorneys-at-law, practicing in Washington, D. C.

17. I decline to attach a copy of said communication for the reasons stated in answer to Questions No. 4 and No. 5. [397]

18. Yes.

19. I decline to attach a copy of said answer for the reasons stated in answer to Questions No. 4 and No. 5.

20. I did not. George Baglin, who is an attorney-at-law and was then my assistant in the Compliance Department of defendant corporation at San Francisco, California, did send a written communication to R. H. Baglin on June 4, 1946.

21. I decline to attach a copy of such written communication for the reason that the same is a privileged communication between attorney and client.

2. No. I did, however, on June 5, 1946, instruct my assistant, George Baglin, attorney-at-law, to secure J. B. Donnelly's file on this matter.

23. This question has been answered by my answer to Question No. 22. I have no memorandum of such instructions.

24. I received Mr. Donnelly's file, examined it, and, according to my best recollection, had it returned to Mr. Donnelly.

Plaintiff's Exhibit 59-A—(Continued)

25. Yes.

26. I decline to attach a copy of that memorandum for the reasons stated in answer to Questions No. 4 and No. 5. [398]

27. Yes.

28. I called Mr. Whipple on June 6, 1946, at Los Angeles, and after telling him who I was I told him I was calling for Schenley Distillers Corporation to advise him that Schenley Distillers Corporation would not enter into a contract with Engraw to purchase Argentine glucose. Whipple replied that what I meant was that I was repudiating on Schenley's behalf the contract completed by letter on Schenley's letterhead signed by Donnelly and dated May 23. I told him that Schenley's position was that there was no contract between Schenley and Engraw; that the parties to the proposed contract had never agreed upon specification; that no samples had been approved; that Schenley had never issued any purchase order and that Schenley had not put up the letter of credit and that in our opinion there was no contract and that I was phoning him this information for transmission to Engraw.

Whipple replied that there was damage, that he had acted in good faith upon the written word of a Schenley official upon Schenley's letterhead. I told him Donnelly was not an official of Schenley. He then said that he supposed Schenley could go into court and claim that Donnelly was not an



## Plaintiff's Exhibit 59-A—(Continued)

official and [399] had no authority to commit Schenley. I repeated that our position was that we had not approved samples, that we had not issued any purchase order, that we had not furnished or agreed upon specification and had not put up any letter of credit and that there was no contract so far as we were concerned. He then asked me to state in writing that we were repudiating the deal and give our reasons for doing so. I told him that I would transmit his request to the proper person. He again repeated that he had acted in good faith on Donnelly's letter of May 23, and that now he had been advised, presumably by one of Schenley's lawyers, that Schenley repudiated the contract made by Mr. Donnelly. I said I was a member of the Law Department.

He said that he had forwarded to Many Blanc in Chicago the day before a part of the sample that he had of the product; that he had gone to a lot of expense and trouble and that he "smelled a rat" in the deal when Schenley had requested a sample; that undoubtedly Schenley was trying to deal directly in the Argentine market and cut someone out of a commission that had been earned. I repeated our position that there was no contract and again told him the reasons for it. He then repeated his request that Schenley notify him in writing, and I again told him that I [400] would pass his request on to the proper persons. He then asked that Schenley's reasons for repudiation be given in

Plaintiff's Exhibit 59-A—(Continued)

his written notice that it had repudiated the contract.

29. Yes.

30. I did not send this telegram upon the direction of any executive officer of the defendant corporation but at Mr. Whipple's request, with the consent of Mr. Heymsfeld, general counsel for Schenley Distillers Corporation, who is not an executive officer thereof. I told Mr. Heymsfeld of my conversation with Mr. Whipple and of Whipple's request that I communicate in writing with him concerning the conversation. Mr. Heymsfeld said he saw no objection to it and that he thought it was a good idea.

31. Yes.

32. I did not receive any direction from any executive officer or anyone else. I sent it on my own initiative in my capacity as one of the lawyers for defendant corporation.

33. I believe the symbols referred to indicate that the cost of the wire is to be charged to Roma Wine Company's account with the telegraph company.

34. —I decline to attach any such reports as [401] requested for the reasons stated in answer to Questions No. 4 and No. 5.

/s/ JAS. E. WOOLSEY

## Plaintiff's Exhibit 59-A—(Continued)

State of California

City and County of San Francisco—ss

Jas E. Woolsey, being first duly sworn, deposes and says that he has read and knows the contents of each of his answers to each of the interrogatories propounded to him by plaintiff and that said answers to each of said interrogatories are true.

/s/ JAS. E. WOOLSEY

Subscribed and sworn to before me this 6th day of February, 1948:

/s/ ALFRED O. MARTIN

Notary Public in and for the City and County of San Francisco, State of California." [402]

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Mr. L. B. Stanton: Now I will ask to have introduced into evidence, your Honor, the depositions taken in Buenos Aires of the witnesses Louis Ditisheim, Ricardo Horacio, Norbert Eduardo Auge, Juan Lang, Constantine Negri, Mario Polastri, Rodolfo Guila, and Angel Gabriel. These are probably embraced in one package. Together with the depositions of Dr. Laudislaw Lakatos and Dr. Alberto Padilla. The last two are names of attorneys who gave testimony upon the state of the Argentine law. The first named are those who give testimony with respect to the market value of the glucose markets on the various dates involved in this suit.

There is another matter which I might mention, and that is, one of these witnesses, Juan Lang, is

the one which we asked the permission of the court to take his testimony next week.

The Court: Yes.

Mr. L. B. Stanton: So I do not know whether they desire us to introduce his deposition at this time or defer it to the full time.

Mr. Rowe: Let me understand, is that the gentleman you said would be here on the 9th?

Mr. L. B. Stanton: That is right; that is, he will be here for that purpose on a different branch altogether.

The Court: If he is going to be here why introduce [403] the deposition?

Mr. L. B. Stanton: The particular purpose of his being here is for a different line of questioning.

The Court: Of course, counsel under the rule may object to a deposition where it is stated that the witness is available.

Mr. L. B. Stanton: He is not available at the present time.

The Court: Of course, he will not be available until he gets here. I am not raising an objection.

Mr. L. B. Stanton: There is nothing at all certain that he will be here. Possibly he will be here.

Mr. Bronson: Just a moment. With counsel's suggestion that he is limiting the examination of this witness to other matters than the subjects of the deposition, it is our understanding, we will let the deposition go in.

The Court: What is your desire with regard to the depositions? Are there any objections?

Mr. Bronson: Yes, your Honor, on other scores, on other points.

The Court: Supposing we mark them for identification at the present time and then we will take up the objections.

Mr. Rowe: I would suggest if I may, your Honor, that the questions, as you have said this morning, are sort of pattern questions, the same questions addressed to different [404] groups.

The Court: That is right.

Mr. Rowe: It seems to me that we could identify the depositions by groups and make the objections to the same series of questions asked.

The Court: That is all right.

Mr. L. B. Stanton: That can be readily done.

The Court: That can be done and I do not need to read them now, you see. [405]

The Court: Then, supposing we do this, suppose we receive them in evidence subject to the objections which the counsel are about to make.

Mr. E. B. Stanton: The objections, of course, to these interrogatories have heretofore been settled.

The Court: I am leaving it open to any suggestions that counsel desire to make at the present time. All right. They will be received in evidence and so marked. Now, don't shrug your shoulders in despair. They are received in evidence and I will now proceed to hear any objections to special questions contained in any of the exhibits. All right. Mark them, now.



The Clerk: You will have to give me those names again.

Mr. E. B. Stanton: There is Louis Ditisheim.

The Clerk: Do you wish the interrogatories themselves to go in?

Mr. L. B. Stanton: Yes, the interrogatories and the answers.

The Court: Mark them the same way you had the ones before.

The Clerk: Ditisheim's interrogatories become Plaintiff's Exhibit 60 and the answers 60-A.

The Court: And the answers 60-A, that is right, as long as you have adopted that system.

The Clerk: Yes. [406]

The Court: They are admitted in evidence.

Mr. L. B. Stanton: Does that file there contain the depositions of Padilla and Verela?

The Court: Well, he is taking them individually, so it does not make any difference.

Mr. L. B. Stanton: Well, you see, Padilla and Verela were two attorney witnesses. They are really in rebuttal testimony.

The Court: Oh—why don't we designate those that we take in and exclude those, and we are not taking the entire file. We are taking them individually, and we are wasting time. Take up those that go in first.

The Clerk: Plaintiff's Exhibit 60 in evidence.

The Court: Rather than have a listing from counsel. Call each person as the name appears to you, in the order in which they appear here and



when you get to one of the lawyers, call the name and Mr. Louis Stanton will tell you whether to exclude them or not. Now, what have you done?

The Clerk: Plaintiff's Exhibit 60 has been given to the commission to take deposition on written interrogatories, together with the interrogatories to be propounded.

The Court: All right, that applies to all of them.

Mr. Bronson: It applies to all the proper witnesses, not to the attorneys.

The Court: The first witness is who? [407]

The Clerk: That one is Luis Ditisheim.

Mr. L. B. Stanton: He is okay.

The Court: All right.

The Clerk: That is Plaintiff's Exhibit 60-A in evidence.

Mr. Rowe: Subject to the objections, your Honor.

The Court: That is right, each of them subject to objections to particular questions and answers which I will entertain as soon as we have gone through with this bookkeeping. I think that businessmen think sometimes you can run a court the way they run a factory, but they do not realize how many elements there are in it, human elements and they do not realize why you cannot run it the way they run a factory.

What is the next one?

The Clerk: Norberto Eduardo Auge.

The Court: All right.

Mr. L. B. Stanton: Okay.

The Clerk: His answers are marked Plaintiff's Exhibit 60-B in evidence.

The next answer is by Ricardo Horacio.

Mr. L. B. Stanton: Okay.

The Clerk: His answers are marked 60-C in evidence.

The next is the answers of Mario Polastri.

Mr. L. B. Stanton: Okay.

The Clerk: His answers are marked Plaintiff's 60-D [408] in evidence.

Mr. L. B. Stanton: Okay.

The Clerk: The next are the answers of Juan K. Lang, which are marked Plaintiff's Exhibit 60-E in evidence.

The next answers are those of Angel Gabriel.

Mr. L. B. Stanton: Yes.

The Clerk (Continuing): Which are marked Plaintiff's Exhibit 60-F in evidence.

The next answers are those of Ladislao Lakatos.

Mr. L. B. Stanton: Okay.

The Clerk: Which are marked Plaintiff's Exhibit 60-G in evidence.

The next answers are those of Horacio Varela.

Mr. L. B. Stanton: No. That is an attorney.

The Court: Put that aside.

Mr. Bronson: We have no objection to those going in, even though they are rebuttal, at this time. [409]

The Court: Do you want them in, then?

Mr. L. B. Stanton: Well, the only thing, there is——

Mr. Bronson: That is, if they are offering it now subject to any objections that there may be.

Mr. L. B. Stanton: I think they better go in as rebuttal evidence.

The Court: All right. You have the control, yourself.

The Clerk: The next answers are those of Alberto Padillo.

Mr. E. B. Stanton: That is another attorney.

The Court: All right.

The Clerk: Apparently there are no further answers. That concludes the group.

The Court: All right.

Mr. Rowe: Now, may it please the Court:

The first group of persons to whom some of the questions were addressed consists of witnesses Diti-sheim, Horacio, Auge, Lang and Polastri, and their answers are marked respectively Plaintiff's Exhibits 60-A to 60-E, inclusive.

The Court: All right.

Mr. Rowe: The first question to which—oh, first, your Honor, may I call your attention to a few of the questions and answers given, so I can point up the objections which I have in mind: The first question that raises the point is No. 7: [410]

“Was there a market for glucose made from pure corn syrup, crystal clear, testing between 43° and 45° Baume in Buenos Aires during the years of 1946 to 1947 up to the first of May of that year?”

That is interrogatory No. 7 and the answer is——

Mr. E. B. Stanton: Whose answer?

Mr. Rowe: The witness Ditisheim:

“Glucose is made from maize, not from corn syrup. There was a market for glucose crystal clear testing between 43° and 45° Baume.”

Now, his next question: He is asked:

“Do you know the amount of glucose purchased and sold?”

And he says he does not know.

He is then asked, “If you have answered the preceding interrogatory in the affirmative, please state to your knowledge the market price for each month of the year commencing with the first day of May, 1946, and continuing up to the first day of May, 1947.”——

Mr. L. B. Stanton: Wait a minute until I get that.

The Court: Whose answer are you reading from?

Mr. Rowe: I am going to read from Mr. Ditisheim's, your Honor.

The Court: Ditisheim's, all right.

Mr. Rowe: Now, he has asked, in Interrogatory No. 9: [411]

“If you have answered the preceding interrogatory in the affirmative, please state to your knowledge the market price for each month of the year commencing with the first day of May, 1946, and continuing up to the first day of May, 1947 at the Buenos Aires market for glucose made from pure corn syrup crystal clear testing between 43° and 45° Baume.”

To that interrogatory, he says:

“The market during the months of May and June, 1946 was between 1,15 and 1,25. It went down sharply at the end of June and from June on it has kept round about 60 centavos per kg.”

Now, he is asked:

“Is there any difference between the market price for glucose made from corn syrup for export and that for domestic consumption? If so, state the facts which occasion such difference.”

His answer is:

“There is a difference between the market price for glucose for export to that for domestic consumption, namely, about 15 centavos, which covers the wood tierce and expenses, taxes, etc.”

Now, in 10 he says: “Is there any difference between them and if so, state the facts which constitute the difference.” [412]

Then, he comes in his next answer, he says:

“My answer to point 10 covers this question, namely, that there is a difference of 15 centavos per kilogram composed of 10 centavos per kilogram for the tierce and 5 centavos for taxes and expenses, such as banking expenses, inspection of supervisors, loading on board.”

Now, those answers raise the point that I want to make and I want to move to strike those answers, upon the grounds that each of them is incompetent, irrelevant and immaterial and not responsive to any of the issues made in this case, either under the pleadings or under the testimony which has been adduced up to this point.



The reason for the motion is that in this particular case we are dealing with glucose for export and the only thing that would have any admissibility in this case as to market value would be the market value of glucose for export. Now, he says that there is a difference and, by the way, Mr. Berger said so in his testimony this morning, that there is a difference between the market price for glucose for export and for glucose for domestic consumption.

The situation that develops is that having said that and these witnesses that followed him, and to whom were sent the same interrogatories, each specify the different prices and say what makes it up. [413]

Now, the first point is that the export price is the price with which we are concerned, if we are concerned with any. That has been held most recently I think in a case which is reported in 68 Cal. Ap. (2d. Series) decided in 1945 at page 564.

The case is *Boston Iron & Metal Company v. William Rosenthal*. In that case upon the issue of damages, there was testimony. I will withdraw that statement.

That case involved a sale of scrap iron for export. A suit was filed by the plaintiff to recover moneys which he alleged the defendant owed him, growing out of the transaction, and the defendant seller countered with a suit for damages for the purchaser's alleged breach of contract.

The judgment went for the defendant seller on this counter claim and the measure of damages was taken to be not the domestic price of scrap iron



but the export price of scrap iron, and between the two, the testimony showed that there was a difference, and the difference was the ultimate figure which was taken in establishing the damage, which was the export price.

Now, so much for the fact that in this case we are concerned with the export price of glucose and not the price in the domestic market which was one of the figures that has been given in this testimony.

The Court: Well, however—— [414]

Mr. Rowe: Now, I am coming to the next point, your Honor, if you will just permit me for a moment.

The Court: Yes.

Mr. Rowe: On the next point, in a fairly recent case decided in 1942, reported in 50 Cal. App. (2d), at page 79, Southern Pacific Milling Company (A corporation) v. Billiwhack Stock Farm Ltd., the court had to do with the measure of damages on the sale of rolled barley. The only testimony as to damages was testimony as to the market value or market price of barley, and the witness who gave the testimony, then, to get them to convert it into rolled barley, did this, according to the case:

“Q. How do you arrive at that price, Mr. Furman?”

That was the question asked.

“A. Because on that date the barley market, the barley was selling and was worth 90 cents a hundred in the valley where it was grown, Santa Inez. Santa Inez is a section where we buy our barley.

We add 10 cents transportation and 10 cents for rolling, a dollar a ton profit, that makes an aggregate of \$23.00.”

And that was the basis of his testimony as to the market value of rolled barley.

Now, that is the same system which the plaintiff has adopted in this case.

Now, bear in mind that the plaintiff in this case in the [415] purchase of this glucose, purchased it and sells it to us at a profit. The price which these people fix as the export price of glucose is in bulk. And then they get what they call their export price and they add the cost of barreling and the expenses that are incident to the exportation of the product. That, in the language of this case, we urge is not a proper method of determining what the market price of this glucose was on the dates in question.

The Court: Doesn't that go to the weight, rather than to the admissibility?

Mr. Rowe: This case was reversed because that was the method on which the damages was based.

The Court: Well, was that the only witness?

Mr. Rowe: That was the only testimony. And I am pointing out to you that the testimony of all four of these witnesses follows that same pattern.

The Court: Well, of course I am not bound by rules of testimony followed by the State courts.

Mr. Rowe: I am not urging that. I am simply urging to your Honor that on the question of damages, on the question of measure of damages, the State courts do follow the rule that I am now urging.

Mr. L. B. Stanton: What is that rule?

Mr. Rowe: That rule is that you have got to establish the market value by following the market price of export [416] goods. It is not that you say the export price is sixty or seventy cents and add 10 for barreling and so much for incidentals. You say the purchase price was the export price of glucose. That is glucose in barrels, ready to go.

The Court: I am not familiar with that case, but frankly I can't see its logic, because it goes merely into the reasons. This man starts to tell you how they arrived at it.

Mr. Rowe: That is exactly what this man did.

The Court: How?

Mr. Rowe: That is precisely what this man did.

The Court: The California courts, on the question of value, are among the weakest of the country. They have spun—they have split hairs and, thank goodness, the Supreme Court has said we are not bound by them in condemnation cases, because they have had the most fantastic rules when it came to condemnation. In fact, now all of us here in this District have kicked out the famous rule decided way back in 35 Cal. Appellate, and that is that sales can only be used by way of cross-examination, a rule on which I found myself bound in a decision I wrote in a case, but now we find they bring them in anyway, and the jury doesn't know the difference. If they came in by way of cross-examination, you might as well have them come in the front door and just say the man took into

consideration the sales and what the sales were. So I can't [417] see the logic of a case like that. Suppose a man had just said the market price was such and such and stopped there. Then on cross-examination you would ask him, "How did you arrive at the market price?" He is testifying to a custom of arriving at a price. A formula price is just as good as a price—and he says, "I haven't read the answers, but there is a difference in the price, period", and the way you arrive at it is by adding to whatever their price is on that day, the amount. Then he goes on to say that on the basis of what the price is—then he goes further and says on the basis of that he is not going to give me the formula, but reduces it to a practical figure by giving you what the price was domestically on that day, and answers 15 centavos.

Mr. Rowe: You say you don't understand the logic. I will give you the logic that is in this decision.

The Court: Who wrote that opinion of the Court?

Mr. Rowe: It was the District Courts of Appeal. It was written by Judge Shaw, sitting pro tem.

The Court: Well, he has my respect.

Mr. Rowe: It was concurred in by Shinn and Wood.

The Court: Was a hearing denied?

Mr. Rowe: Petition for a rehearing was denied.

The Court: Well, I have respect for Judge

Shaw. I sat with him not only on the Superior Court but also in our little Supreme Court, for six months, I mean the Appellate Department [418] of the Superior Court. I have great respect for his opinion.

Now, read what it says.

Mr. Rowe: They say, "The witness' first general statement of market price here"—

Bear in mind he stated a flat figure.

"——can have no greater force or effect, even on appeal, than his immediately ensuing explanation of its meaning. According to the explanation, it merely states what would have been the cost to the plaintiff at the time in question of buying whole barley elsewhere, rolling it and transporting it to Santa Paula, with a profit added. What the statute calls for is 'the market or current price.'

" 'Market price' and 'market value' when applied to any article, mean the same thing. They mean the price or value of the article established or shown by sales in the way of ordinary business . . . 'Market value' is the price at which goods are freely offered in the market to all the world."

The Court: Now, that is an entirely different proposition. Is that our volume?

Mr. Rowe: Yes, I borrowed it from your library. I have signed for it.

The Court: No, no. Bring my own copy. Give me 50 Cal. Ap. (2d.). Each of us has a set. [419]

Mr. Rowe: Well, I got that from the library. I read from the last subdivision, your Honor.



The Court: All right. I will read it. You take this and I will take my copy. What is the page again?

Mr. Rowe: Paragraph 8, on page 87 and continuing on page 88.

The Court: All right. Have you concluded?

Mr. Rowe: No. On that particular point.

Now, your Honor, the next plaintiff's interrogatory——

The Court: Well, I am ready to rule on this.

Mr. Rowe: Yes.

The Court: I have not found the section to which the opinion refers. Section 1784 as amended produced the element of damage which is common to all of the Uniform Sales Act. Section 1784:

“Action for damages for nonacceptance of the goods.

(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

(2) (Measure) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question, the measure damages is, in the absence of special circumstances, showing proximate damage of a [420] greater amount, the difference between the contract price and the market or current price at the time or times when the goods



ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept." And so forth.

Now, I think this case can be readily distinguished, because the man added not only actual cost of transportation, but he added a profit; and while here the witness is asked first if there was a difference and what that difference was, and instead of giving it in round numbers, he says, "We take the market price and we add so much for added expenses." He does not speak of a profit and he does not limit it to the market. While here Judge Shaw pointed to the fact that he limited it to profit and further on in the opinion he points to the fact that he was talking about transportation, about the profit and cost of transportation to a certain point:

"According to the explanation, it merely states what would have been the cost to plaintiff at the time in question of buying whole barley elsewhere, rolling it and transporting it to Santa Paula, with a profit added. What the statute calls for is 'the market or current price.' 'Market price' and 'market value,' when applied to any article, mean the same thing. They mean the price or value of the article established or shown by sales in the way of ordinary business. 'Market [421] value' is the price at which goods are freely offered in the market to all the world."

He puts "to all the world" in italics, then he cites a case and then states:

“(emphasis by the court)”

“The evidence quoted does not show that there was an available market, or that there was a current or market price for rolled barley at the time and place of the breach. In the absence of these factors, Section 1784 Civil Code provides other rules for estimating damages, but there is no evidence by which they can be applied.” [422]

I think that that case is not applicable because this man is not asked what it would have cost him. He is asked to stick with the question whether there was a market price, and he is asked if there was any difference, and he said, “Yes,” and then he stated the difference amounts to so much in money which is added to each sale. Therefore he does not limit it as to the particular place to which it is to be transported. He says that we add that to the local price, and for that reason I believe that that case does not apply and the objection to the answer or motion to strike the answer to the interrogatory will be denied.

If you will indicate now the witnesses in whose answers similar answers are found, why, I will state for the record that the ruling will apply to such testimony.

Mr. Rowe: Similar answers, your Honor, maybe not verbatim, but substantially the same answers, will be found in Plaintiff's Exhibits 60-B, 60-C, 60-D, 60-E.

The Court: All right. The ruling will be the same.

Mr. Rowe: Yes, your Honor. The only other point in this particular series of interrogatories or answers, your Honor, has to do with the response of some of these witnesses to a cross interrogatory. These witnesses were asked in the 18th interrogatory——

Mr. L. B. Stanton: 18th cross? [423]

Mr. Rowe: Correct. Were asked in the 18th direct interrogatory:

“Q. Did you have occasion to export any glucose between the 1st day of May, 1946 and the 1st day of May, 1947? If so, give details of operations of such export such as the procurement of any license payment of taxes, and expenses referring to transferring glucose from the domestic to the foreign market.” [424]

They went on to say——

Mr. L. B. Stanton: With reference to what deposition?

Mr. Rowe: Ditisheim. I am talking entirely of Mr. Ditisheim.

The Court: Yes; I have it in front of me.

Mr. Rowe: This witness goes on to say in his answer to that on direct that he did have occasion to export between those dates and that he shipped some to Ireland and some to Sweden. In our cross interrogatory we ask——

Mr. L. B. Stanton: Also to Peru and to Switzerland.

Mr. Rowe: I beg pardon?

Mr. L. B. Stanton: Also to Peru and to Switzerland.

Mr. Rowe: All right. I was not attempting to give them all. In our cross interrogatory we asked this witness——

The Court: I have it before me. Go ahead.

Mr. Rowe: In our cross interrogatory we asked this witness if he had exported any glucose during those periods to give the date on which the license or on which the licenses for export were issued.

The point that revolves around is that under the laws of Argentina an export license, as I am informed, may be granted for a period of as long as six months; and therefore this answer is not responsive to the issues in this case insofar as it pertains to the ability of the plaintiff to perform its contract and secure licenses for the export [425] of glucose, for the reason that all it shows is an exportation of glucose, whereas the material thing is the time at which the license was acquired or secured for the exportation of the glucose. He is very artful. This witness has very artfully dodged that in answering our cross interrogatory. In the answer to the direct interrogatory he has covered certain shipments of glucose.

Mr. L. B. Stanton: What are you referring to?

Mr. Rowe: I am referring to the witness, Mr. Dittersheim—to the fact——

Mr. L. B. Stanton: What cross interrogatory?

Mr. Rowe: To our cross interrogatory. I thought I stated that.

The Court: You are reading that in conjunction——

Mr. E. B. Stanton: The cross interrogatory to question No. 18?

Mr. Rowe: That is right. It is the seventh cross interrogatory.

The Court: Subdivision (d) you mean?

Mr. Rowe: Yes, your Honor. Now, our cross said this:

“(a) Did you actually export any glucose between May 1, 1946 and May 1, 1947?

“(b) If your answer to the foregoing question is yes, was such glucose so sold and exported crystal clear pure corn syrup glucose testing [426] between 43° and 45° Baume?

“(c) For whom and to whom was such or any export sale made and to what country was such or any glucose exported by you? State exact date of each sale, amount of each sale, kind of glucose involved, how it was packed, and the price.

“(d) Please indicate as to each sale whether deliveries were actually made to other countries and export license or export licenses actually issued, and identify the export license or licenses, if any, by date, and number and name of official issuing the same.”

He comes back and says that he can't give that information. He simply says deliveries were made—— [427]

The Court: Doesn't that go to the weight? Because, in other words, you show that his answer could not be correct.

Mr. Rowe: That is right.



The Court: That the answer given on the interrogatory is not correct in the light of the answer he gave to the cross interrogatory. In other words, your claim is that he impeaches himself. Supposing he were on the stand, you would not strike out his testimony. You would merely ask me to disregard it because it is contradictory.

Mr. Rowe: Well, I would press him to have him answer to the date on which he got his export license.

The Court: But that would not strike out the answer he had given before. You are merely working under the limitation of written interrogatories. I will deny the motion.

Mr. Rowe: Those are all the objections we have to the answers to that particular set of interrogatories.

I can handle the other, I think, rather quickly, your Honor. They have been identified as being offered as two sets of answers, one by a witness Gabriel and one by a witness Lokatos, being numbered respectively Plaintiff's Exhibit 60-F and Plaintiff's Exhibit 60-G. The objections I made to the other questions would run likewise to the questions put to these witnesses whose testimony, in the [428] main, deals with the existence of converting bulk glucose at 60 centavos and any other price f.a.s. into f.o.b. In other words, it is an explanation of the difference between bulk glucose and export glucose.

The Court: All right. I have ruled on them and the same ruling will apply. [429]



## PLAINTIFF'S EXHIBIT 60

In the District Court of the United States for the  
Southern District of California, Central Division  
No. 6223-BH

COMPANIA ENGRAW COMERCIAL E IN-  
DUSTRIAL S. A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,  
Defendants.

Commission to Take Deposition

On Written Interrogatories

The President of the United States of America:

To Any Consul, Vice-Consul, or Consular Agent  
of the United States of America, residing in the city  
of Buenos Aires, Republic of Argentina, or To  
Any Notary Public duly authorized under the laws  
of the Republic of Argentina to administer oaths,  
Greeting:

Whereas, it appears to the judge of the above  
entitled court that there are located within the city  
of Buenos Aires, Republic of Argentina, and at the  
addresses set opposite their respective names, each  
and all of the hereinafter named witnesses, to wit:

Dr. Victor Daniel Goytia, or some attorney in his  
office, 501 Av. Roque Saenz Pena;

Dr. Horacio Beccar Varela, or some attorney in  
his office, 430 Bartolome Mitree; [430]

Dr. Alberto Padilla, 501 Av. Roque Saenz Pena;

Luis Ditisheim, Reconquista 379;

Ricardo Horacio, Cangello 315;

## Plaintiff's Exhibit 60—(Continued)

Norbert Eduardo Auge, Reconquista 379;  
Juan Lang, Av. Roque Saenz Pena 615;  
Constante Negri, San Martin 233;  
Mario Polastri, Av. Roque Saenz Pena 760;  
Rodolfo Guila, San Martin 329;  
G. Fred Berger, San Martin 329;  
Blas Gabriel, or Angel Gabriel, 25 de Mayo;  
Laudislaw Lakatos, 25 de Mayo 347; and

Official of the Argentine Government who deals with the export licenses, and that each and all of said persons are material witnesses in a certain action now pending in said court between the above named parties, we, in confidence of your prudence, competence and fidelity, have appointed, and by these presents do appoint you a Commissioner to take the deposition of said witnesses, and therefore we authorize and empower you at certain dates and places to be by you for that purpose appointed, diligently to examine each of said witnesses in answer to the direct and cross-interrogatories annexed to this Commission, and upon the oath of each of said witnesses first taken before you, which oath you are hereby authorized to administer, and cause the said examination of each of the said witnesses to be reduced to writing, [431] cause the same to be read to or by said several witnesses so deposing and subscribed by each of said witnesses and then certify under your seal and signature and make return thereof annexed to this Commission, to the Clerk of the above entitled court at the Fed-

## Plaintiff's Exhibit 60—(Continued)

eral Building in the City of Los Angeles, County of Los Angeles, State of California, United States of America, with all convenient speed, enclosed in a sealed envelope directed to said Clerk and forwarded to him by the usual channels of conveyance for mail.

Witness The Honorable Ben H. Harrison, District Judge of the United States, this 6 day of November, 1947, and in the one hundred seventy-second year of the Independence of the United States of America.

EDMUND L. SMITH,

Clerk.

By EDWARD F. DREW,

Deputy Clerk.

Interrogatories numbered one to nineteen both inclusive to be propounded on the part of the Plaintiff to each of the following named witnesses whose addresses are given in the notice to which this is attached.

Luis Ditisheim, Ricardo Horacio, Norbert Eduardo Auge, Juan Lang, Mario Polastri.

1. Please state your name, age, residence and occupation.

2. Please state the length of time in which and the [432] places where you have followed your present occupation, and therein give the extent of the operations of yourself or of any concerns with which you are or have been associated in said occupation or operation.

Plaintiff's Exhibit 60—(Continued)

3. Do you know the parties to the above entitled action or either of them and if so, how long have you known such party or parties?

4. Are you a member of any commodity exchange located in the City of Buenos Aires? If so, give a brief statement of the extent and manner of operation of said exchange and length of time in which you have been a member thereof.

5. Do you know from what raw products glucose is manufactured in Argentine? If so, please state, and if it is within your knowledge, give the annual production of each kind.

6. Do you know the amount of glucose consumption in Argentine per annum, the amount exported, the carry over, and the balance on hand during the years of 1946 and 1947 to date? If so, please give such details as to any of such items as may be within your knowledge.

7. Was there a market for glucose made from pure corn syrup, crystal clear, testing between 43° and 45° Baume in Buenos Aires during the years of 1946 to 1947 up to the first of May of that year?

8. Do you know the amount of glucose purchased and sold [433] either for domestic consumption or for the export during the years of 1946 to 1947 and the prices paid therefor, and the prices for which such glucose was bought and sold? If so, please state.

9. If you have answered the preceding interrogatory in the affirmative, please state to your

## Plaintiff's Exhibit 60—(Continued)

knowledge the market price for each month of the year commencing with the first day of May, 1946, and continuing up to the first day of May, 1947 at the Buenos Aires market for glucose made from pure corn syrup crystal clear testing between 43° to 45° Baume.

10. Is there any difference between the market price for glucose made from corn syrup for export and that for domestic consumption? If so, state the facts which occasion such difference.

11. Is there any difference between the market price which you have stated and the price for which such glucose is delivered free on board of ship in the harbor of Buenos Aires? If so, state the facts which occasion such difference and the amount thereof in pesos and centavos.

12. Was all glucose produced to your knowledge during the years 1946 and up to May 1, 1947, made from pure corn syrup crystal clear and testing between 43° to 45° Baume? If not, please state the prices of glucose conforming to other specifications and that conforming to the specifications as stated.

13. In case you have testified that you were familiar with the market and market conditions of the purchase and sale of glucose during the year 1946 and 1947 up to the 1st day of May thereof, please state in detail what, if any, effect it would have had upon said market in case 460 tons of glucose made from pure corn syrup crystal clear and testing between 43° to 45° Baume had been offered



Plaintiff's Exhibit 60—(Continued)

for immediate sale by public vendue in the month of September, 1946.

14. State likewise the effect in like manner of such type of glucose as mentioned in the preceding interrogatory but amounting to 735 tons should be offered for sale in October, 1946, a like offering of 935 tons in November, 1946, and a like offering of 1135 tons in December, January, February, March, or April of 1947. Give in that respect particular details to each of said months as though specifically set forth in a separate interrogatory.

15. Would the fact that said glucose so offered for sale during said months was packaged in wood cooperage containing approximately 660 pounds each have influenced the price at which such glucose could be sold at public vendue?

16. Do you know if in the practice of sales in the Buenos Aires market, it is the custom or practice of dealers to require and transmit with purchases and sales an analysis by a chemical laboratory of the composition and density of said glucose? If so, please state such practice. [435]

17. In your opinion and practice, did the price of glucose other than that complying with the specifications hereinabove noted have any effect upon the market price for crystal clear pure corn glucose testing between 43° to 45° Baume? If so, please state the effect.

18. Did you have occasion to export any glucose between the first day of May, 1946 and the first day



## Plaintiff's Exhibit 60—(Continued)

of May, 1947? If so, give details of operations of such export such as the procurement of any license, payment of taxes, and expenses referring to transferring glucose from the domestic to the foreign market.

19. Have you had any experience in the practice of that which is done in the Buenos Aires market in the case of cancellations of contracts of the sale of glucose or other commodities? If so, please state in full the practice of and in said market and custom of dealing and disposing of said glucose or commodities in such cases in said market. Give special attention thereto to the manner of sale or disposition, the investigation of prices, withholding during the period when the market may break and the length of time for which said withholding of the merchandise may be had.

Interrogatories numbered one to seven inclusive are to be propounded to the following named witnesses, whose residences are given in the notice to which this is attached.

Constante Negri, Mario Polastri, Blas or Angel Gabriel, L. Lakatos.

1. Please state your name, age, residence and occupation.

2. Please state the length of time for which and the places where you have followed your present occupation and give the extent of the operation therein of yourself or of any concerns with which you have been or are associated in said occupation or operation.

Plaintiff's Exhibit 60—(Continued)

3. Do you know the parties to the above entitled action or either of them, and, if so, how long have you known such party or parties?

4. Do you have any particular authorization from the government of Argentine or any state or city thereof to follow your business or occupation? If so, state the facts in connection therewith.

5. Do you know the cost of taxes payable and other expenses entailed in transferring commodities from a free at ship side delivery in Buenos Aires harbor to a free on board delivery on ship for export in Buenos Aires harbor?

6. If you have answered the preceding interrogatory in the affirmative, please state such cost, taxes and all other expenses entailed in transferring one (1) ton of glucose made from pure corn syrup crystal clear testing between 43° to 45° Baume packaged in wood cooperage containing approximately 660 pounds each from Buenos Aires or from free at ship side delivery Buenos Aires to free on board delivery on board ship for export in the harbor of Buenos Aires.

7. Do you know the cost of cooperage for one ton of said glucose in the Buenos Aires market and the cost of delivery from the Buenos Aires market to free at ship side delivery; Buenos Aires harbor and the cost of free on board ship delivery Buenos Aires harbor? If so, state such cost in detail giving the items incident thereto.

Interrogatories numbered one through eight both

## Plaintiff's Exhibit 60—(Continued)

inclusive are to be propounded to the official in the charge of issuing of export licenses in the Republic of Argentine.

1. Please state your name, age, residence and occupation.

2. Please state the length of time in which you have held your present position and therein give the extent of operations and of your rights and duties under said office.

3. Do you know the party or parties to the above entitled action, and if so, how long have you known such party or parties?

4. In the duties of your office, have you had the occasion during the period commencing with May 1, 1946, to May 1, 1947 to issue or authorize the issuance of any licenses export in glucose?

5. During the period mentioned in the preceding interrogatory, were there any laws, rules, ordinances, regulations, or decrees governing your issuance of licenses? If so, attach to this deposition a true and correct statement and copy thereof.

6. Please state in detail the practice of your office in the issuance of licenses for exports of glucose during the period hereinabove stated, and state any and all licenses for exports thereof which during said period you executed providing said statement is in accordance with the rules of your office.

7. Will you please state if Plaintiff in said action filed application for the issuance of licenses for exports of glucose. If you find that it did,

Plaintiff's Exhibit 60—(Continued)

please attach copy thereof to this deposition. Further, please state what action was taken thereon if said licenses were granted. Attach hereto a true and correct copy of the license or licenses so granted.

8. In respect to all copies which you have attached hereto, have you compared said copies with the originals on file in your office, and in your custody, and are they true and correct copies thereof, and can you, and do you, hereby certify that they are true and correct copies thereof?

Interrogatories numbered one to fifteen, inclusive to be propounded to G. Fred Berger:

1. Please state your name, age, residence and occupation.

2. Are you acquainted with the plaintiff or the defendant in the above entitled action? And if you have stated that you are, please state the length of time for which said acquaintance has continued and the nature thereof.

3. Do you hold any official position in or with plaintiff company? If so, state what position it is, the length of time which it has been held by you.

4. Do you know Harold A. Whipple of Los Angeles, California? If so, state the length of the period of your acquaintance.

5. Did said plaintiff company, to your knowledge, at any time have any business relations with Harold A. Whipple? If so, state the facts relative thereto.

## Plaintiff's Exhibit 60—(Continued)

6. In case said dealings were in writing, show to the Commissioner herein the original of said writings and attach to this deposition copy or copies thereof, duly certified by him.

7. Do you know the defendant Schenley Distillers Corporation? If so, state the length of the period of your acquaintance.

8. In case said dealings were in writing, show to the Commissioner herein the original of said writings and attach to this copy or copies thereof, duly certified by him.

9. Subsequent to June 1, 1946, and prior to the 18th day of September, 1946, did you have any dealings with the defendant in this case or any of its officers, or any persons assuming to represent it? If so, detail said dealings, mention therein in each case the date of meeting, parties present, place where the meeting occurred and the substance of that which was said and done at said meetings relative to any glucose purchase.

10. Did your company purchase glucose upon the Buenos Aires market in May of 1946? If so, give details of purchase, that is to say, amounts, specifications and deliveries of any and all purchases made.

11. Did you make an investigation as to the salability of glucose made from pure, crystal clear, corn syrup of density 43° to 45° Baume during the period from May 1, 1946 to May 1, 1947, on the Buenos Aires market? If so, state at length



Plaintiff's Exhibit 60—(Continued)

the nature and facts relative to said investigation.

12. What, if anything, did you do as to disposition of any glucose which you heretofore testified that you held or acquired between the 1st day of May, 1946, and the 1st day of May, 1947.

13. Do you know if there was a market for the purchase and sale of glucose in Buenos Aires during the period between May 1, 1946, and May 1, 1947? If so, please state the facts of your knowledge as to such market.

14. On the 18th of September, 1946, did you give any notice to defendant Schenley Distillers Corporation as to glucose which you had purchased?

15. Deliver to the Commissioner herein for examination, and attach to this deposition copies certified by said Commissioner, of any and all telegrams or correspondence which you may have had with Schenley Distillers Corporation between May 1, 1946, and May 1, 1947.



Plaintiff's Exhibit 60—(Continued)

In the District Court of the United States for the  
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E IN-  
DUSTRIAL S. A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a  
corporation,

Defendant.

### CROSS-INTERROGATORIES

Cross-Interrogatories to be propounded to each  
of the following named persons:

Luis Ditisheim, Ricardo Horacio, Norbet Eduardo  
Auge, Juan Lang, Mario Polastri,  
of the city of Buenos Aires, Republic of Argentina,  
before a Commissioner to be appointed to take the  
deposition of each of said witnesses on behalf of  
the plaintiff in the above entitled action.

To Plaintiff's Interrogatory No. 2:

(a) Have you ever been a manufacturer or ex-  
porter of glucose?

(b) State all of your prior occupations and the  
period of time devoted by you to each.

To Plaintiff's Interrogatory No. 3:

(a) Have you ever been or are you now em-  
ployed by or have you ever acted as agent or broker

Plaintiff's Exhibit 60—(Continued)

for or had business relations of any kind or character with either plaintiff or Sociedad Industrial Financiera Argentina or Eugenio Lang or Ricardo Gonzales Y Cia.?

(b) If your answer to the foregoing question is yes, state the name of the person or company and the nature and duration of the relationship.

(c) Are you acquainted with any of the individuals or the officers of any of the companies named in cross-interrogatory (a) to plaintiff's Interrogatory No. 3?

(d) If your answer to the foregoing question is yes, state the names of the individuals or officers of the company and briefly state the nature of your acquaintanceship and for what period of time it has existed.

To Plaintiff's Interrogatory No. 4:

(a) What is a commodity exchange?

(b) How many such exchanges are there in Buenos Aires?

(c) Is each publicly or privately owned?

(d) Are such exchanges competitive?

To Plaintiff's Interrogatory No. 5:

(a) State whether in the Republic or Argentina glucose is manufactured from sugar cane and from beets, and if so, give annual production of glucose from each in the years 1946 and 1947.

To Plaintiff's Interrogatory No. 6:

(a) State also if you know the amount of consumption in the Republic of Argentina per annum,

## Plaintiff's Exhibit 60—(Continued)

the amount exported, the carry-over, and the balance on hand during the years 1946 and 1947 to date of glucose made from sugar cane and of glucose made from corn syrup.

## To Plaintiff's Interrogatory No. 9:

(a) Give bid and asked range each month in the period from May 1, 1946 to May 1, 1947, on any commodity exchange in Buenos Aires on Argentine glucose of the type and kind of specified in these interrogatories.

## To Plaintiff's Interrogatory No. 18:

(a) Did you actually export any glucose between May 1, 1946 and May 1, 1947?

(b) If your answer to the foregoing question is yes, was such glucose so sold and exported crystal clear pure corn syrup glucose testing between 43° and 45° Baume?

(c) For whom and to whom was such or any export sale made and to what country was such or any glucose exported by you? State exact date of each sale, amount of each sale, kind of glucose involved, how it was packed, and the price.

(d) Please indicate as to each sale whether deliveries were actually made to other countries and export license or export licenses actually issued, and identify the export license or licenses, if any, by date, number and name of official issuing the same.

Cross-interrogatories to be propounded to each of the following named persons:

Plaintiff's Exhibit 60—(Continued)

Constante Negri, Mario Polastri, Blas or Angel Gabriel, L. Lakatos, of the City of Buenos Aires, Republic of Argentina, before a Commissioner to be appointed to take the deposition of each of said witnesses on behalf of the plaintiff in the above entitled action:

To Plaintiff's Interrogatory No. 2:

(a) State all of your prior occupations and the period of time devoted by you to each.

To Plaintiff's Interrogatory No. 3:

(a) Have you ever been or are you now employed by or have you ever acted as agent or broker for or had business relations of any kind or character with either plaintiff or Sociedad Industrial Financiera Argentina or Eugenio Lang or Ricardo Gonzales Y Cia.?

(b) If your answer to the foregoing question is yes, state the name of the person or company and the nature and duration of the relationship.

(c) Are you acquainted with any of the individuals or the officers of any of the companies named in cross-interrogatory (a) to Plaintiff's Interrogatory No. 3?

(d) If your answer to the foregoing question is yes, state the names of the individuals or officers of the company and briefly state the nature of your acquaintanceship and for what period of time it has existed.

Plaintiff's Exhibit 60—(Continued)

To Plaintiff's Interrogatory No. 5:

(a) What is the source of your information, if any, given in answer to Interrogatory No. 5?

To Plaintiff's Interrogatory No. 6:

(a) State whether any costs, taxes, or other expenses that you may have given in answer to Interrogatory No. 6 would be varied or diminished in handling single shipments of the described glucose ranging in quantity from 60 tons to 275 tons each.

(b) Please state the items of said costs, taxes and other expenses separately.

(c) Was there any variation or fluctuation in said costs, taxes and/or other expenses during the period May 1, 1946 to May 1, 1947, and if so please set out in schedule form the said variance during said period of time.

Cross-interrogatories to be propounded to the official in charge of issuing of export licenses in the Republic of Argentina, before a Commissioner to be appointed to take the deposition of said witness on behalf of the plaintiff in the above entitled action:

To Plaintiff's Interrogatory No. 2:

(a) State all of your prior occupations and the period of time devoted by you to each.

(b) State who was in charge of any department of the Argentine Government in which you were employed between May 1, 1946 and May 1, 1947,

Plaintiff's Exhibit 60—(Continued)

by name and title. Also state if there were more than one officer or official of said department superior to you, giving the names of any such officers, the title of each, and the duties of each position.

To Plaintiff's Interrogatory No. 3:

(a) Have you ever been or are you now employed by or have you ever represented in any capacity or had private business relations of any kind or character with either plaintiff or Sociedad Industrial Financiera Argentina or Eugenio Lang or Ricardo Gonzales Y Cia.?

(b) If your answer to the foregoing question is yes, state the name of the person or company and the nature and duration of the relationship.

(c) Are you acquainted with any of the individuals or the officers of any of the companies named in Cross-Interrogatory (a) to Plaintiff's Interrogatory No. 3?

(d) If your answer to the foregoing question is yes, state the names of the individuals or officers of the company and briefly state the nature of your acquaintanceship and for what period of time it has existed.

To Plaintiff's Interrogatory No. 4:

(a) In the duties of your office, have you actually, or has your office actually issued or authorized the issuance of any export licenses for glucose during the period May 1, 1946 to May 1, 1947?

(b) In said period of time, has your office actually issued export licenses for crystal-clear pure



## Plaintiff's Exhibit 60—(Continued)

corn syrup glucose testing between 43° and 45° Baume?

(c) If your answer to the last question is yes, state what export licenses were issued month by month during the said period for Argentine glucose of the type and grade specified, and also state to what consignees and what countries said exports so licensed were sent.

## To Plaintiff's Interrogatory No. 5:

(a) Have you attached all of the laws, rules, ordinances, regulations, decrees and orders, made or promulgated by the Republic of Argentina or any department of said government, applicable to the export and the licensing for export of Argentine glucose of the kind and grade specified? If you have not, please supply all of the same.

(b) State whether there were during the period May 1, 1946 to May 1, 1947, any restrictions, conditions, or limitations, either written or verbal, promulgated or in effect respecting the licensing for export of said Argentine glucose.

(c) Was there in effect during said period any practice in the said departments of said government restricting, conditioning or limiting in any respect the export of said glucose or the licensing thereof.

## To Plaintiff's Interrogatory No. 6:

(a) State what person or agency determines the policy and practice, if any, that you have described in answer to Interrogatory No. 6.

Plaintiff's Exhibit 60—(Continued)

(b) State what export licenses of Argentine glucose of the kind and grade specified were issued in each of the months June to December of 1946, inclusive, and further state to what countries said export of said glucose was made under said licenses, if any.

(c) If export licenses of said glucose were issued in each or any of the months June to December, 1946, inclusive, state whether or not exports under said licenses were withheld during the whole or any part of said period.

(d) If under any rule of the office in which you are employed you are unable to supply any of the information required by Interrogatory No. 6, state the name of any person or persons, or any official or officials of your office or any department of the Argentine Government who can supply the information therein required.

To Plaintiff's Interrogatory No. 7:

(a) Did plaintiff file more than one application for issuance of license for export of glucose?

(b) Please attach copies of all said applications.

(c) If said applications do not show upon their face the filing date, please supply from any information available the date of filing of same.

(d) Please state what action was taken upon each and all of said applications, whether license under said licenses were withheld during the whole was granted or was not granted, and the date upon which said action was taken.

(e) Please attach hereto copies of all corre-

## Plaintiff's Exhibit 60—(Continued)

spondence between your office or government department, and the plaintiff, and copies of all orders or other communications setting forth the terms and conditions of the order made upon such applications for export licenses, whether the same were granted or not granted.

## To Plaintiff's Interrogatory No. 8:

(a) Have you attached hereto all applications, orders, correspondence and other documents bearing upon said applications for licenses by plaintiff to export said glucose during the period May 1, 1946 to December 31, 1946? If not, please supply all thereof.

Cross-Interrogatories to be propounded to G. Fred Berger of the City of Buenos Aires, Republic of Argentina, before a Commissioner to be appointed to take the deposition of each of said witnesses on behalf of the plaintiff in the above entitled action:

## To Plaintiff's Interrogatory No. 5:

(a) When did plaintiff company first have business relations with Harold A. Whipple? Describe the nature of said business relations and the continuity thereof up to and including June 7, 1946.

(b) In any and all business transactions between plaintiff company and Harold A. Whipple, state severally in what capacity the said Harold A. Whipple dealt with or represented or acted on behalf of plaintiff company.

Plaintiff's Exhibit 60—(Continued)

(c) In what capacity did Harold A. Whipple act on behalf of plaintiff company in the activities involved in this litigation?

(d) Has Harold A. Whipple acted in similar capacity in other transactions for plaintiff company?

(e) If your answer to the foregoing interrogatory is yes, please indicate the nature and extent of the transactions in which Harold A. Whipple has acted in the capacity described in your answer to Cross-Interrogatory (c) to Plaintiff's Interrogatory No. 5, and attach hereto copies of all correspondence communications, orders, invoices and other writings relative to the said transactions.

To Plaintiff's Interrogatory No. 6:

(a) Have you in response to Interrogatory No. 6 included copies of all communications in writing, by telegram, radiogram or letter, relating to the transaction in this litigation? If not, please include copies of all such communications.

(b) Did you have any telephone conversations with Harold A. Whipple in connection with the matters involved in this litigation? If so, please state the date on which said telephone conversations occurred and give as nearly as you can the substance of each.

To Plaintiff's Interrogatory No. 10:

(a) Were any of such alleged purchases made on or through any commodity exchange? If so, state the names of the commodity exchange or ex-

## Plaintiff's Exhibit 60—(Continued)

changes on or through which any such purchases were made, giving the date and quantity purchased on or through said commodity exchange or exchanges and the price at which it was purchased.

(b) If said alleged purchases were not made on or through any commodity exchange, how did the purchase price compare with the bid and ask price, if any, for glucose of the same kind and quality, on a commodity exchange on the date on which any such alleged purchase was made?

(c) Were any such alleged purchases made from or through any of the following persons:

Luis Ditisheim, Ricardo Horacio, Norbert Eduardo Auge, Juan Lang, Mario Polastri?

(d) Were any of the alleged purchases the result of competitive bidding?

(e) Attach hereto all correspondence between the plaintiff and the sellers of said glucose and all bills and invoices respecting the same, all office memoranda of plaintiff bearing upon the alleged purchases of said glucose, and copies of any contracts or purchase of said glucose. Also state in substance, giving the date thereof, any personal or telephone conversation or conversations between plaintiff or any of its agents, officers or employees, and the sellers of said glucose or any of its officers, agents or employees, respecting the alleged purchase and sale of glucose referred to in this interrogatory.

(f) Were all or any of such purchases made subject to prior sale, subject to issuance of a letter



Plaintiff's Exhibit 60—(Continued)

of credit, or subject to any other condition of any kind whatsoever?

(g) State whether any contracts or orders for the purchase of glucose made or entered into by plaintiff company during the year 1946, have been rescinded or cancelled; or whether there has at any time from May, 1946, down to date, been any agreement, writing, conversation or understanding limiting, conditioning, releasing or affecting in any way the alleged purchases of said commodity or the liability of the plaintiff company thereunder. Attach to this deposition copies of any writing last above referred to and give the substance of any conversation, stating the date and persons between whom said conversation was had.

To Plaintiff's Interrogatory No. 11:

(a) In addition to the nature and facts of the alleged investigation, if any, state precisely the sources of all information that may be given in answer to this interrogatory, the names of the persons, the dates and places of the interviews, the documents, records, and other written or published data that may have been examined by you.

(b) Give us precisely the date on which you started this alleged investigation and the date on which you concluded it.

To Plaintiff's Interrogatory No. 12:

(a) Did plaintiff company make any attempt to sell any glucose which it purchased in May, 1946?



## Plaintiff's Exhibit 60—(Continued)

If your answer is yes, please state when plaintiff company first attempted to make a sale or other disposition of glucose which it had purchased or acquired in May, 1946, and state what was done.

(b) Over what period of time from May 1, 1946 to December 31, 1946, were attempts made by plaintiff corporation to dispose of said glucose? Please specify in your answer to the last question what attempts were made month by month during the period last mentioned, and also state the persons, firms or corporations with whom any negotiations were had or to whom any offers were made. Also please state whether any offers were made of sales and said glucose acquired during May, 1946, upon any commodity exchange, giving the date and quantity offered upon said commodity exchange and the price at which it was offered.

## To Plaintiff's Interrogatory No. 13:

(a) Please state the sources of any information that you have supplied in answer to this interrogatory.

Plaintiff's Exhibit 60—(Continued)

In the District Court of the United States for the  
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E INDUS-  
TRIAL S. A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,  
a corporation,

Defendant.

NOTICE OF INTENTION TO TAKE DEPOSI-  
TIONS OF WITNESSES ON WRITTEN  
INTERROGATORIES

To Defendant in the Above Entitled Action and  
to Messrs. Bronson, Bronson & McKinnon, attor-  
neys for said defendant:

You and Each of You Will Please Take Notice  
that plaintiff in the above entitled action, by leave  
of court had on the 22nd day of September, 1947,  
hereby files the following amendment to written  
interrogatories of the following named witnesses:

Dr. Victor Daniel Goytia, or some one of the at-  
torneys in his office;

Dr. Horacio Beccar Varela, or some one of the  
attorneys in his office;

Dr. Alberto Padilla, or some one of the attorneys  
in his office.

## Plaintiff's Exhibit 60—(Continued)

1. Please state your name, age, residence, and occupation.

2. Please state length of time in which and the places where you have followed your present occupation and therein give the extent of the operations of yourself or of any firm or office with which you have been associated in such occupation or operation.

3. Please state the names of all colleges which you have attended, degrees which you have attained, date of your admission to the practice of law. If you have heretofore stated you are an attorney, any official position which you have held or do now hold in the government and the general extent of your practice or that of any office in which, or with which, you are or have been connected, particularly relating to the subject of sales of personal property.

4. The defendant Schenley Distillers Corporation has pleaded as one of its defenses that the export of glucose from the Argentine Republic to any other country was specifically prohibited by the laws of the Argentine Republic Numbers 12,591 and 12,831, and Article 14 of Law Number 15,591 and by regulations and orders regularly passed and made thereunder so that it would have been impossible for plaintiff to perform its contract.

Will you please attach to this deposition a copy of each one of said mentioned laws and one copy of each regulation and order regularly passed and made under said respective laws.

## Plaintiff's Exhibit 60—(Continued)

The said respective laws and the respective regulations and orders thereunder may be evidenced by an official publication thereof by the Argentine Government, which you can identify in your answer to this interrogatory or by a copy attested by the official having legal custody thereof, or his deputy, and accompanied by a certificate that such official has its custody. All documents must also be authenticated by usual certificate of the consul, vice-consul or consular agent of the United States, stationed in Argentina. There need be only one set of these documents, attached to the answer of one of the answering witnesses. Reference may be made to said set by any other witness.

Unless said respective laws, regulations or orders specifically so provide, will you please state the date when each went into effect, the period of duration of each and whether or no there have been any repeals or other termination of any one or more thereof. In this respect, please identify and attach copies of any and all laws, rules or regulations affecting the effective dates, period of duration or termination or repeal of said laws, regulations, rules or orders, the sources upon which you give your opinion and reasons therefor. Be careful to designate in your answer the particular regulations and orders, if any, passed under each particular law. Said respective laws and the respective regulations and orders thereunder may be evidenced and certified as hereinabove in this interrogatory specified.

## Plaintiff's Exhibit 60—(Continued)

5. Were there any laws, rules or regulations other than those hereinabove stated which affected the export of corn syrup glucose of any kind or nature whatsoever during the period of said contract, other than those above stated? If so, attach a copy thereof to your answer to this deposition in form as hereinabove, in interrogatory 4, described.

6. Have there been any interpretations of these or any of the laws, rules or regulations with respect to export licenses by any of the courts, executive or administrative officers of the Argentine Republic relative to the grant or procurement of export licenses during the period of this contract.

7. In case your answer to the foregoing interrogatory is in the affirmative, please state fully such interpretations. If in writing, attach copies thereof, certified as hereinabove, in interrogatory 4, specified.

8. The plaintiff in said action counts upon a contract, the portion of which essential for the purpose of this deposition is set forth in letter of date May 23, 1946, which is attached to the amended complaint on file, as Exhibit "A", and also hereto attached. In your professional opinion, under the provisions of the law applicable to the particular period, from and term of this contract, would it have been legally impossible for plaintiff to have performed the matters and things by it to be performed at the specific times performance thereunder was due?

9. In case you have given your opinion in answer

Plaintiff's Exhibit 60—(Continued)

to the preceding interrogatory herein, please state the reasons for said opinion, and if there have been any decisions in the Argentine courts thereon, please cite such decisions.

10. In your professional opinion, will you please state the difference between a law of the Argentine Republic, a decree thereof, and regulations or orders, and therein state the reasons for your opinion.

11. In case there are found to be variances or conflicts between any of these respective regulations or orders and laws applicable thereto and under which they are made, please state that which in your professional opinion prevails, and in this respect state the reasons for such opinion. In case there have been any court decisions thereon, please cite said decisions.

12. On June 7, 1946, the defendant Schenley Distillers Corporation delivered to plaintiff a telegram stating that it would not enter into any agreement with plaintiff for purchase of glucose. In your professional opinion, under the existing laws of the Argentine Republic, would this fact alter any opinion which you have heretofore in this deposition given?

13. If you have given your opinion in answer to the preceding interrogatory, please state herein the reasons for said opinion and therein cite and set forth any court decisions which you may deem applicable thereto.

Dated: This . . . . . day of October, 1947.



## Plaintiff's Exhibit 60—(Continued)

## EXHIBIT "A"

Schenley Distillers Corporation

850-900 Battery Street

San Francisco 11, California

Telephone YUkon 0440

May 23, 1946

Harold A. Whipple Co.

316 Commercial Street

Los Angeles 12, California

Attention: Mr. H. A. Whipple

Gentlemen:

This will confirm our telephone conversation and your letter of May 21st.

We hereby acknowledge the offer of Cia. Engraw Comercial & Industrial S. A., of 600 tons of glucose made from pure corn syrup, crystal clear, and testing between 43 and 45 Baume, at a price of 1.375 pesos per kilogram. The price listed is f.o.b. steamer, Buenos Aires, packages in wood cooperage containing approximately 660 pounds each. Shipment is to be made via McCormick Steamship Co. to San Francisco or Los Angeles.

A purchase order will be sent to Cia. Engraw Comercial & Industrial S. A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos. Expiration date will be October 30, 1946, or as confirmed. Shipment of this material is to be at a rate of 150 tons a month.

Plaintiff's Exhibit 60—(Continued)

All correspondence will be handled via air mail instead of regular mail in order to speed this matter.

Very truly yours

SCHENLEY DISTILLERS  
CORPORATION

/s/ J. B. DONNELLY.

JBD:LP

P. S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial S. A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept. 200; Sept.—150; October—275; November—200; December—200. The conditions of acceptance of this quantity are the same as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing.

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## PLAINTIFF'S EXHIBIT 60-A

In the District Court of the United States for  
the Southern District of California, Central  
Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E INDUS-  
TRIAL S. A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,

Defendant.

INTERROGATORIES AND  
CROSS-INTERROGATORIES

Republic of Argentina,  
City of Buenos Aires,  
Embassy of the United  
States of America—ss.

Deposition of sundry witnesses, taken before me,  
Jones R. Trowbridge, Consul of the United States  
of America at Buenos Aires, Argentina, under and  
by virtue of authority granted by a commission  
issued out of the District Court of the United States  
for the Southern District of California, Central  
Division, in a certain cause pending therein and at  
issue between Compania Engraw Comercial e In-  
dustrial S. A., a corporation, Plaintiff, and Schenley  
Distillers Corporation, Defendants.

Plaintiff's Exhibit 60-A—(Continued)

Dated at Buenos Aires, Argentina, this 5th day of December, 1947.

/s/ JONES R. TROWBRIDGE,

Consul of the United States  
of America.

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In the District Court of the United States for  
the Southern District of California, Central  
Division

No. 6223-BH

COMPANIE ENGRAW COMERCIAL E IN-  
DUSTRIAL S. A., a corporation,  
Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,  
Defendants.

INTERROGATORIES and  
CROSS-INTERROGATORIES

Deposition of Luis Ditisheim, taken before me, Jones R. Trowbridge, Consul of the United States of America at Buenos Aires, Argentina, at 2:30 p.m. on November 20, 1947, under authority and by virtue of a commission issued out of the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause.

It appearing that the witness, Luis Ditisheim, did

## Plaintiff's Exhibit 60-A—(Continued)

well understand the English language, I, Jones R. Trowbridge, Consul of the United States, who also well understand the said language, administered the oath and the interrogatories and cross-interrogatories were put to him in the English language.

The answers of the witness, Luis Ditisheim, to said interrogatories and cross-interrogatories were taken down stenographically by Carlota S. de Lange, of Vidal 1940, Buenos Aires, who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Luis Ditisheim, a witness now to be examined. So help you God.”

Luis Ditisheim of 379 Reconquista, Buenos Aires, Argentina, manager of Sociedad Industrial Financiera Argentina, SIFAR S.A., of Reconquista 379, Buenos Aires, Argentina, 37 years of age, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God,” deposes and says:

Answers by Luis Ditisheim to Interrogatories:

To the First Interrogatory, he says:

Luis Ditisheim, 37 years of age, address Reconquista 379, manager of Sociedad Industrial Financiera Argentina, SIFAR S. A. of Reconquista 379, Buenos Aires.

Plaintiff's Exhibit 60-A—(Continued)

To the Second Interrogatory, he says:

I have been during the last five years manager of the Sociedad Industrial Financiera Argentina SIFAR S. A. and have not been associated with any other concern during the past 17 years. Our firm deals as exporters of raw materials and food stuffs with an average turnover of about 5,000,000 pesos.

To the Third Interrogatory, he says:

I have known Compania Engraw Comercial e Industrial S. A. since May 1946. I have known Schenley Distillers Corporation by reputation since many years. I have met Mr. Dichter who said to be the firm's South American representative and who paid me several visits during the second part of 1946 in connection with this business and in company of Mr. Fred Berger of Compania Engraw Comercial e Industrial S. A.

To the Fourth Interrogatory, he says:

I am a member of the Bolsa de Comercio de Buenos Aires, since about 3 years. The Bolsa de Comercio is a very well known Institution; I submit a Bulletin marked Exhibit "A." The Bolsa de Comercio is by far the largest institution of its kind in South America and includes among other things, the stock exchange of this City and the future grain market.

To the Fifth Interrogatory, he says:

All the glucose manufactured in this country is



## Plaintiff's Exhibit 60-A—(Continued)

made from maize. I do not know the exact production; in my own opinion it is about 30,000 tons yearly.

To the Sixth Interrogatory, he says:

I do not know the amount of glucose consumption in Argentina. The total export of 1946 is of about 8,000 tons, gross weight equal to 7,000 tons net weight. I do not know the balance on hand during the years of 1946 and 1947 to day, but it is something well known that the balance on hand has been increasing considerably since the second part of 1946 as foreign buyers have withdrawn on account of the enormous crop of maize in the U. S. A. which has brought down considerably the price of glucose and the interest for this commodity from Argentina.

To the Seventh Interrogatory, he says:

Glucose is made from maize not from corn syrup. There was a market for glucose crystal clear testing between 43° and 45° Baume.

To the Eighth Interrogatory, he says:

I do not know the amount of glucose purchased and sold either for domestic consumption or for export during 1946 and 1947. The price of glucose during this period was of between 55 and 60 centavos per kg.

To the Ninth Interrogatory, he says:

The market during the months of May and June 1946 was between 1,15 and 1,25. It went down

Plaintiff's Exhibit 60-A—(Continued)

sharply at the end of June and from June on it has kept round about 60 centavos per kg.

To the Tenth Interrogatory, he says:

There is a difference between the market price for glucose for export to that for domestic consumption, namely about 15 centavos, which covers the wood tierce and expenses, taxes, etc.

To the Eleventh Interrogatory, he says:

My answer to point 10 covers this question, namely that there is a difference of 15 centavos per kg composed of 10 centavos per kg for the tierce and 5 centavos for taxes and expenses, such as banking expenses, inspection of supervisor, loading on board.

To the Twelfth Interrogatory, he says:

All the glucose produced to my knowledge during the years of 1946 and up to May 1, 1947, was made from maize and was crystal clear and testing between 43° and 45° Baume.

To the Thirteenth Interrogatory, he says:

The effect would have been to accentuate the demoralization of the market which was falling under the pressure of the record maize crop in the U. S. A.; in other words the effect would have been to bring the price still very much lower and therefore diminish the value of all stocks of glucose available at that time. It is not usual on this market to sell such goods in public auction. It can safely said that buyers could only have been found

## Plaintiff's Exhibit 60-A—(Continued)

at ridiculous low prices in selling that way. In fact, for this very reason Sociedad Industrial Financiera Argentina SIFAR S. A., which brought an arbitration suit against Compania Engraw Comercial e Industrial S. A., did not insist on the glucose not received by Compania Engraw Comercial e Industrial S. A. to be sold in public auction, because it would have taken off to the bottom of the market.

To the Fourteenth Interrogatory, he says:

It is impossible to state with accuracy what the result might have been. I can only say to the best of my judgment that such a sale would have in any case and at any time have been made in a very unfavourable way and so much the worse if the quantity was larger and larger.

To the Fifteenth Interrogatory, he says:

Yes adversely, because local users buy glucose in bulk or in steel drums of 200 kgs which are afterwards returned to the manufacturer and remain his property. Should they buy glucose in tierces it would mean additional trouble to break up the tierces which would have been of no commercial value to them.

To the Sixteenth Interrogatory, he says:

It is often done but not always. Buyers who have already bought previously do not usually ask for such an analysis, because they know that the standard of Argentine glucose is very even and that it meets the requirements of the U. S. Pharmacopea.

Plaintiff's Exhibit 60-A—(Continued)

It must be said that there are only two manufacturers of glucose in Argentina, both of them considered as reliable.

To the Seventeenth Interrogatory, he says:

No, because to any practical purpose there is no other glucose in Argentina than crystal clear pure corn glucose testing between 43° and 45° Baume.

To the Eighteenth Interrogatory, he says:

We have exported during this period 600 longtons to Ireland, also some smaller lots to Peru and to Switzerland. We also shipped some 300 tons to Sweden. Export licenses have been forthcoming and we have paid the usual tax of .5% for same. For exports since the month of November 1946 we have also had to deliver to the Government, the equivalent of 1% of the maize used in the making of the glucose exported which we had to buy on the free market and give up at an official set lower price. Our shipments to Ireland, Switzerland and Peru took place during the months of July, September, November and December 1946. Our shipment to Sweden took place in April 1947. We also paid the sales tax of 1.25% of the glucose exported and stevedoring expenses.

To the Nineteenth Interrogatory, he says:

In cases of contracts celebrated on official forms of the Bolsa de Comercio, it is a contract obligation to go to arbitration in case of non fulfillment of contract or of unilateral cancellation, which in my

## Plaintiff's Exhibit 60-A—(Continued)

opinion comes to the same thing. Each party nominates an arbitrator and both arbitrators appoint a third one who is called upon when the two first arbitrators cannot agree to give the final verdict. If any of the parties does not comply with this verdict, the other party may apply to the Bolsa de Comercio for an official copy of this verdict and this can be produced before a law court in order to initiate legal proceedings against the other party. Before the judgment of the arbitrators has been given, the parties have not the free disposition of the goods. Therefore the goods cannot be disposed of in any way until the judgment of the arbitrators has been made known. The arbitrators are free to chose any proceeding they feel fit to decide on prices. Arbitrators have no executive functions and limit themselves to say, who is wrong, and how much. Once the judgment of the arbitrators is made public, it is exclusively the business of the party which has suffered the damage, to dispose of the goods in the best possible way.

Answers by Luis Ditisheim to Cross-Interrogatories:

To the First Cross-Interrogatory (to Plaintiff's Interrogatory No. 2) he says:

- (a) Exporter yes; manufacturer no.
- (b) Seventeen years with present employer.

To the Second Cross-Interrogatory (to Plaintiff's Interrogatory No. 3) he says:



Plaintiff's Exhibit 60-A—(Continued)

(a) I have been employed and still am exclusively by Sociedad Industrial Financiera Argentina SIFAR S. A. My firm maintains good business relations with Eugenio Lang S.R.L. and with R. H. Gonzalez y Cia. and with the Plaintiff.

(b) I have been employed with Sociedad Industrial Financiera Argentina SIFAR S. A. and during the last five years I have been manager in said firm. Our firm has maintained business relations with Eugenio Lang S.R.L. for the last five years, with R. H. Gonzalez y Cia. for the last two years, with the Plaintiff for the last two years.

(c) Yes, although this acquaintance is purely commercial between our firms and not of a private character.

(d) I repeat that my acquaintance with these firms and their officials has been purely on the commercial level. I know personally Mr. Juan Lang and Mr. Eugenio Lang of Eugenio Lang S.R.L.; Mr. Ricardo Gonzalez of the firm R. H. Gonzalez y Cia.; Mr. Fred Berger of Compania Engraw Comercial e Industrial S. A.

To the Third Cross-Interrogatory (to Plaintiff's Interrogatory No. 4) he says:

(a) It is a place where goods are bought and sold.

(b) Two.

(c) Privately.

(d) No. The Bolsa de Comercio is by far the most important; the other Bolsa de Cereales, is restricted to spot lots of of cereals.



## Plaintiff's Exhibit 60-A—(Continued)

To the Fourth Cross-Interrogatory (to Plaintiff's Interrogatory No. 5), he says:

(a) No glucose is made here except from maize.

To the Fifth Cross-Interrogatory (to Plaintiff's Interrogatory No. 6), he says:

(a) I repeat only corn glucose is made in this country and I do not know the amount of consumption in the Argentine Republic nor the carry-over or the balance on hand during the years 1946 and 1947 to date. The export of glucose in 1946 was of about 8,000 tons, gross weight—7,000 net weight. I repeat there is no glucose made in Argentina from sugar cane.

To the Sixth Cross-Interrogatory (to Plaintiff's Interrogatory No. 9), he says:

(a) Glucose is not an item on which the prices of transactions are published. The contracts registered at the Bolsa de Comercio for glucose are never made public.

To the Seventh Cross-Interrogatory (to Plaintiff's Interrogatory No. 18), he says:

(a) Yes.

(b) Yes.

(c) Most of the details asked for under this point have been answered in Plaintiff's Interrogatory No. 18.

(d) Licenses are issued by a Government office called Secretaria de Industria e Comercio, Direccion de Importacion y Exportacion. Such licenses have

Plaintiff's Exhibit 60-A—(Continued)

to be surrendered once shipment has taken place; therefore it is not possible to give the information asked for in this point. Deliveries actually took place and of course the export licenses have actually been issued, as otherwise the merchandise could not have been shipped.

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PLAINTIFF'S EXHIBIT No. 60-B

In the District Court of the United States for the  
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E INDUSTRIAL S.A. a Corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,

Defendants.

INTERROGATORIES AND CROSS-  
INTERROGATORIES

Deposition of Norberto Eduardo Auge, taken before me, Jones R. Trowbridge, Consul of the United States of America at Buenos Aires, Argentina, at 10 a.m. on November 21, 1947, under authority and by virtue of a commission issued out of the District Court of the Southern District of California, Central Division, in the above-entitled cause.

## Plaintiff's Exhibit 60-B—(Continued)

It appearing that the witness, Norberto Eduardo Auge, could not intelligently testify in the English language and did well understand the Spanish language, one Clara Robine, of Avda. R. Saenz Pena 530, Buenos Aires, Sworn Public Translator, who also well understands the Spanish and English languages, was employed as interpreter and was sworn in as follows:

“You do solemnly swear that you know the English and the Spanish languages and that you will truly and impartially interpret the oath to be administered and interrogatories and cross-interrogatories to be asked Norberto Eduardo Auge, a witness, now to be examined, out of the English into the Spanish language, and that you will truly and impartially interpret the answers of the said Norberto Eduardo Auge thereto out of the Spanish language into the English language. So help you God.”

and said Clara Robine interpreted accordingly.

The answers of the witness, Norberto Eduardo Auge, to said interrogatories were taken down stenographically by Carlota S. de Lange, of Vidal 1940, Buenos Aires, who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Norberto Eduardo Auge, a witness, now to be examined. So help you God.”

The notes were then forthwith transcribed by her under my direction and the said transcript be-

Plaintiff's Exhibit 60-B—(Continued)

ing then read over carefully to the said witness by me was then signed by the said witness in my presence.

Norberto Eduardo Auge of Reconquista 379, Buenos Aires, Argentina, partner of Auge Freres y Cia., S.R.L., Industrial y Comercial, Reconquista 379, Buenos Aires, Argentina, 40 years of age, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God.”

deposes and says:

Answers by Norberto Eduardo Auge to Interrogatories.

To the First Interrogatory, he says:

Norberto Eduardo Auge of Reconquista 379, partner of Auge Freres y Cia., S.R.L., Industrial y Comercial, 40 years of age.

To the Second Interrogatory, he says:

My firm started business in 1935 under the title Auge Freres; in 1938 the contract was modified and the name changed to Auge Freres y Cia.; in the present year 1947, the Company was changed from a common partnership to a limited liability Company with a capital of 1.000.000 pesos Arg. cur. In 1938 the firm added to its business export and import trade. The aggregate operations of this Com-

## Plaintiff's Exhibit 60-B—(Continued)

pany are yearly about 15 to 20.000.000 pesos Arg. cur.

To the Third Interrogatory, he says:

I have known the firm Schenley Distillers Corporation by name for many years and the firm Companie Engraw Comercial e Industrial S.A. for more or less two years.

To the Fourth Interrogatory, he says:

I am a member of the Bolsa de Comercio de Buenos Aires. I am a member since 1945 but my partner Luciano Alfredo Auge has been a member for many years. I don't remember how long the Bolsa de Comercio sponsors most of the transactions for the purchase and sale of products in Buenos Aires. It has special forms for purchase and sale where the names of vendors and purchasers are stated as well as the terms accepted by both of them. The triplicate of said form is registered and kept in file by the Bolsa de Comercio. I attach a copy of such a form marked Exhibit "A."

To the Fifth Interrogatory, he says:

The one product used in Argentina for the manufacture of Glucose is maize.

To the Sixth Interrogatory, he says:

I believe the production of glucose from maize in Argentina is from 35 to 40.000 tons yearly. I have no knowledge of the domestic consumption but the total exports of 1946 being approximately 7.000 tons net, I believe that the balance cannot possibly be absorbed by local consumption, and on our side



Plaintiff's Exhibit 60-B—(Continued)

we still have in stock the 75 tons which we had sold to Compania Engraw Comercial e Industrial S.A.

To the Seventh Interrogatory, he says:

Yes. There was a market for glucose manufactured from pure corn syrup of said classification but very weak for lack of purchasers abroad, during 1946 up to May, 1947.

To the Eighth Interrogatory, he says:

I have no knowledge of local consumption and the fact that from the exports during 1946 over a total of 7.000 tons nett only 2.600 tons nett have been exported during the second half of 1946, proves that the market was weak. As to the figures for 1947 I am not aware of them yet. I cannot give a precise detail of the prices, but I can state that at the time we sold the glucose to Compania Engraw Comercial e Industrial S.A., (the price for export was \$1.20 Arg. cur. and at the time of delivery) [E. Auge (signed) JRT (initialed)] the price for it on this market was 55 to 57 centavos Arg. cur. per kg.

To the Ninth Interrogatory, he says:

I cannot give the detail month by month, but I can state that during the second half of 1946 and the present year the price for glucose of said classification has been from 55 to 57 centavos Arg. cur. per kg with a tendency to become lower. Confirming this statement I wish to add that we have lately sold to Great Britain a shipment of maize



## Plaintiff's Exhibit 60-B—(Continued)

glucose at the price of 53 centavos Arg. cur. per kg.

To the Tenth Interrogatory, he says:

There is no established difference between the prices all depending on the demand of the respective market.

To the Eleventh Interrogatory, he says:

The difference between the price of glucose sold locally or delivered abroad is due to the fact that the glucose for export has to be packed in barrels and pays duties and export taxes to which we should add the cost of transportation to the port of Buenos Aires; the total of such additional expenses is about 15 to 16 centavos Arg. cur. per kg.

To the Twelfth Interrogatory, he says:

All glucose produced during 1946 up to May 1, 1947, was manufactured from pure corn syrup crystal clear, testing between 43° to 45° Baume.

To the Thirteenth Interrogatory, he says:

The market being weak, to offer 460 tons of glucose from pure corn glucose crystal clear classified between 43° and 45° Baume for immediate sale in public vendue in September, 1946, would have been simply disastrous and would have produced an extraordinary lowering of the prices in the market.

To the Fourteenth Interrogatory, he says:

The result of such offers would have made more serious the disastrous situation.

Plaintiff's Exhibit 60-B—(Continued)

To the Fifteenth Interrogatory, he says:

The packing in barrels would not have favoured the public vendue, because the local consumers who would have been at the moment the only purchasers, would have had no interest in the barrels since they usually receive the product in bulk which goes direct to the tanks.

To the Sixteenth Interrogatory, he says:

It is done sometimes but not compulsorily. There being in Argentina only two manufacturers of glucose we know the product and generally we do not require the chemical analysis; the product meets with the requirements of the U. S. Pharmacopea.

To the Seventeenth Interrogatory, he says:

No other glucose is manufactured in Argentina.

To the Eighteenth Interrogatory, he says:

We have exported glucose between May 1, 1946, and May 1, 1947. The amounts exported are as follows: March 9, 1946, 99,909 kg—June 4, 1946, 22,006 kg—January 7, 1947, 10,000 kg—January 7, 1947, 9,775 kg—January 25, 1947, 29,896 kg. The purchase prices varied from 55 to 57 centavos Arg. cur. per kg and the foreign purchases were from several countries including the U.S.A. The obtainment of export permits is done without difficulty. Taxes and other costs total apuroximately 4% of the value of the merchandise.

To the Nineteenth Interrogatory, he says:

Sales contracts being signed on Bolsa de Comer-

## Plaintiff's Exhibit 60-B—(Continued)

cio forms, any of the parties failing to fulfill his obligation, the other party may present his claim to said institution. For more details I attach herewith the provisions of the Bolsa de Comercio for cases of unfulfilment marked exhibit "B." In case the award of the Bolsa de Comercio arbiters is not fulfilled, the plaintiff may apply to the Commercial Court, in order to obtain the enforcement of the award. In case the contracts are not signed through the Bolsa de Comercio, the case should be submitted directly to the Commercial Court. When the unfulfilment is on the part of the purchaser, the cancellation of the contract is requested from the judge and also the plaintiff applies to the judge to get an authorization for selling the merchandise in public auction. The difference between the price obtained in the public auction and the price fixed in the contract is the compensation to damage, which the vendor can obtain in Court. There is no definite time for the disposal of the merchandise. It varies from one month to one year; all depends on the discretion of the judge who choses the moment and the date.

Answers by Norberto Eduardo Auge to Cross-Interrogatories:

To the First Cross-Interrogatory (to Plaintiff's interrogatory No. 2), he says:

(a) I am an exporter and have made local sales, but I am not a manufacturer of glucose.

(b) We devote to exportion since 1938 and be-

Plaintiff's Exhibit 60-B—(Continued)

fore that have acted as representatives for foreign firms.

To the Second Cross-Interrogatory (to Plaintiff's Interrogatory No. 3), he says:

(a) I have not been employed or acted as agent or broker of any of said firms, but I have had business relations as a colleague with Sociedad Industrial Financiera Argentina SIFAR S.A., Eugenio Lang S.R.L. and Compania Engraw Comercial e Industrial S.A.

(b) In Sociedad Industrial Financiera Argentina SIFAR S.A. I know Mr. Ditisheim and Mr. Tilmant, and in Eugenio Lang S.R.L. I know Mr. Eugenio Lang and Mr. Juan Lang, and from Compania Engraw Comercial e Industrial S.A. I know Mr. Berger. I have known these gentlemen for some years and in matters dealing with commercial business.

(c) I answered this already under point (b).

(d) Also answered under point (b).

To the Third Cross-Interrogatory (to Plaintiff's Interrogatory No. 4), he says:

(a) It is an association of traders with the purpose of selling and exchanging commodities.

(b) Two.

(c) Privately owned.

(d) They are not competitive.

To the Fourth Cross-Interrogatory (to Plaintiff's Interrogatory No. 5), he says:

## Plaintiff's Exhibit 60-B—(Continued)

(a) No glucose is manufactured from sugar cane or from beets.

To the Fifth Cross-Interrogatory (to Plaintiff's Interrogatory No. 6), he says:

(a) During 1946, 7.000 tons nett approximately of glucose from corn syrup have been exported. I am not aware of the other points of the interrogatory.

To the Sixth Cross-Interrogatory (to Plaintiff's Interrogatory No. 9), he says:

(a) I cannot give any precise answer due to the fact that transactions in maize glucose are secret and we cannot get information from commodity exchanges.

To the Seventh Cross-Interrogatory (to Plaintiff's Interrogatory No. 18), he says:

(a) Yes.

(b) Yes.

(c) The sales were made to several countries. March 9, 1946, 99.909 kg and June 4, 1946, 22.006 kg exported to the U.S.A.; the selling price for said quantities was 96 centavos Arg. cur. per kg CIF. January 7, 1947, 9.775 kg to Bolivia at 1,10 pesos Arg. cur. per kg CIF. January 7, 1947, 10.000 kg to Bolivia at 1,30 pesos Arg. cur. per kg CIF. January 25, 1947, 29.896 kg to Cuba at 75 centavos Arg. cur. per kg CIF. Such prices include all expenses plus commissions to the selling agents abroad. Besides prices obtained in Bolivia may be

## Plaintiff's Exhibit 60-B—(Continued)

considered as exceptional, because the quantities were very small and therefore the prices did not conform exactly to the standard established. The nett selling price to the foreign purchasers varied in said operations from 60 to 70 centavos Arg. cur. per kg.

(d) Deliveries were actually made to other countries and export licenses were actually issued. As to the other point of the interrogatory I cannot give any precise data since export licenses were returned to the Direccion de Importacion y Exportacion of the Secretaria de Comercio y Industria after fulfilling the delivery.

/s/ CLARA ROBINE,

Interpreter.

/s/ E. AUGE,

NORBERTO EDUARDO

AUGE,

Witness.

/s/ JONES R. TROWBRIDGE,

Consul of the United States  
of America.



PLAINTIFF'S EXHIBIT No. 60-C

In the District Court of the United States for the  
Southern District of California,  
Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E IN-  
DUSTRIAL S.A., a Corporation,  
Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,  
Defendants.

INTERROGATORIES AND CROSS-  
INTERROGATORIES

Deposition of Ricardo Horacio (full name Ricardo Horacio Gonzalez), taken before me, Jones R. Trowbridge, Consul of the United States of America at Buenos Aires, Argentina, at 2:30 p.m. on November 21, 1947, under authority and by virtue of a commission issued out of the District Court of the Southern District of California, Central Division, in the above-entitled cause.

It appearing that the witness, Ricardo Horacio Gonzalez, could not intelligently testify in the English language and did well understand the Spanish language, one Clara Robine, of Avda. R. Saenz Pena 530, Buenos Aires, Sworn Public Translator, who also well understands the Spanish and English languages, was employed as interpreter and was sworn in as follows:

## Plaintiff's Exhibit 60-C—(Continued)

“You do solemnly swear that you know the English and the Spanish languages and that you will truly and impartially interpret the oath to be administered and interrogatories and cross-interrogatories to be asked Ricardo Horacio Gonzalez, a witness, now to be examined, out of the English into the Spanish language, and that you will truly and impartially interpret the answers of the said Ricard Horacio Gonzalez thereto out of the Spanish language into the English language. So help you God.”

and said Clara Robine interpreted accordingly.

The answers of the witness, Ricardo Horacio Gonzalez, to said interrogatories were taken down stenographically by Hella J. de Irniger, of Santa Rosa 2418, Florida F.C.C.A., who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down into notes and faithfully transcribe the testimony of Ricardo Horacio Gonzalez, a witness, now to be examined. So help you God.”

The notes were then forthwith transcribed by her under my direction and the said transcript being then read over correctly to the said witness by me was then signed by the said witness in my presence.

Ricardo Horacio Gonzalez of Cangallo 315, Buenos Aires, Argentina, exporter of Argentine commodities, 67 years of age, being by me first duly sworn as follows:

## Plaintiff's Exhibit 60-C—(Continued)

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God.”

deposes and says:

Answers by Ricardo Horacio Gonzalez to  
Interrogatories

To the First Interrogatory, he says:

Ricardo Horacio (full name Ricardo Horacio Gonzalez), 67 years of age. Residence: Buenos Aires, Cangallo 315. Occupation: Exporter of Argentine commodities.

To the Second Interrogatory, he says:

Forty years in Buenos Aires as an exporter of Argentine commodities; working in raw material in the Capital for export, with an average in export of one million Argentine pesos per annum. In forty years of dealing in this occupation I have business connections with many firms in Argentina especially with those dealing in raw material. I act as a titular of the firm R. H. Gonzalez & Cia., exporters.

To the Third Interrogatory, he says:

I have known the plaintiff for about two years and I do not know the defendant in this case.

To the Fourth Interrogatory, he says:

I am a member of the Bolsa de Comercio of Buenos Aires since 1910. The Bolsa de Comercio is

## Plaintiff's Exhibit 60-C—(Continued)

a private institution which includes the majority of the traders in this line of business; it is a place where there are meetings in which they carry on business and consider any offers related with the matter. The number of the members of the Bolsa is about 4900, and my number as a member is No. 182.

To the Fifth Interrogatory, he says:

All glucose manufactured in Argentina is made from maize. I do not know exactly the annual production, but my own estimation is that approximately 35 to 40,000 metric tons are manufactured per year.

To the Sixth Interrogatory, he says:

I do not know exactly the amount of glucose consumed in Argentina, but I think that this is the difference between the estimated production and the amount exported. In accordance with my estimation and the reports published during 1946 the amount exported was more or less 8000 metric tons. In the first semester of 1947 it was around 6000 metric tons. I do not know [492] the amount carried over because usually the glucose which is not sold either for export or internally is kept in warehouse and the amount is not known to the public.

To the Seventh Interrogatory, he says:

Glucose is in itself a pure corn syrup crystal clean testing between 43-45° Baume and no other glucose is made in Argentina. During the period 1946 up to May 1947 there was hardly any bid for

## Plaintiff's Exhibit 60-C—(Continued)

glucose, the market being very weak especially for exportation.

To the Eighth Interrogatory, he says:

I could not say precisely the amount of glucose bought and sold either for local consumption or for exportation during the years 1946 and 1947. The amount sold for exportation can only be known when deliveries are actually made, which is known from shipping reports when published, according to my answer to interrogatory No. 6. As to the prices paid for exportation they have been from 1.20 Argentine pesos per kilo to 0.50 cents Argentine currency, the market declining continually.

To the Ninth Interrogatory, he says:

I could not say any precise amount for each month since the market was so weak that during some of the months there were no operations at all, but I recall [493] that since May 1946 when the price was 1.20 Argentine currency per kilo it went down during the six following months to 0.60 cents Argentine currency and later up to May 1947 it was difficult to sell even at 0.50 cents Argentine currency. All the preceding data refer to pure corn glucose crystal pure testing from 43-45° Baume.

To the Tenth Interrogatory, he says:

The price for glucose for local consumption is generally lower than for exportation; one of the reasons being that local consumers generally return the containers and besides glucose for exportation

Plaintiff's Exhibit 60-C—(Continued)

incurs in expenses for transportation and port duties which is not the case for internal consumption.

To the Eleventh Interrogatory, he says:

The difference in price, as already explained in my answer to interrogatory No. 10, is about 0.15 Argentine currency per kilo.

To the Twelfth Interrogatory, he says:

As I have already said before, no glucose is produced in Argentina except pure corn glucose testing from 43-45° Baume.

To the Thirteenth Interrogatory, he says:

The effect of an offer of 460 tons of glucose produced from maize crystal clear and classified [494] between 43-45° Baume for auction sale in September 1946, would have caused a still greater depression in prices which might have been about 30 or 40%.

To the Fourteenth Interrogatory, he says:

I think it would have been impossible to sell such large quantities in such a weak market.

To the Fifteenth Interrogatory, he says:

The question of the containers would have had no importance whatsoever. Eventual purchasers would have had in mind the product itself and not the containers.

To the Sixteenth Interrogatory, he says:

It is an optional practice on the part of the pur-



## Plaintiff's Exhibit 60-C—(Continued)

chasers to require an analysis as to determine the composition and density of glucose, but it is not customarily done when dealing with well known brands.

To the Seventeenth Interrogatory, he says:

I am not aware that there were on the market any other types of glucose.

To the Eighteenth Interrogatory, he says:

Only in April 1947 we had made a small sale of about 20 tons of glucose for export to Uruguay, at 0.60 cents Argentine currency per kilo F.O.B., all costs included, i.e. taxes and transportation costs which amount to about 0.15 cents Argentine currency per kilo. At that time it was not difficult to obtain the export [495] permit.

To the Nineteenth Interrogatory, he says:

I have had experience in cancellation of contracts during my long commercial career; two kinds of situations may arise: When the contract has been done privately claims are submitted direct to the commercial courts. In the most common cases when there is a purchase and sale contract done on the official forms of the Bolsa de Comercio, the parties are obliged to appear before said institution in the first place. The procedure in the latter case is as follows: The plaintiff submits his claim in writing to the Bolsa de Comercio, the Bolsa sends a communication to the defendant, enclosing a copy of the claim, the latter is compelled to answer such

## Plaintiff's Exhibit 60-C—(Continued)

claim; The Bolsa then summons both parties for a conciliation meeting; in case of failure to come to an agreement each party must appoint an arbitrator and establish the points to be solved by both arbitrators; when the arbitrators have accepted office they shall meet in order to appoint an umpire, whose decision shall be final in case both arbitrators do not agree. The arbitration court being thus formed all the antecedents are given to the arbitrators and the question is entirely left for them to decide. While this procedure takes place the merchandise, object of [496] the question cannot be touched by anyone, until the award is pronounced by the arbitrators. The arbitrators generally establish the difference existing between the contract price and the market value of the merchandise in which they determine the amount to be paid by one party to the other, or else they decide for the sale of the merchandise through a local broker and the difference is charged to the losing party. In case one of the parties does not fulfil the award, the Bolsa de Comercio applies a punity fine to the member, and/or excludes him from its list of members. In case of unfulfilment of one of the parties the other one may apply to the commercial courts in which an award of the Bolsa de Comercio arbitrators is generally enforced. As I have said at the beginning when the contract has not been done through the Bolsa de Comercio and goes direct to the commercial courts, the procedure is much longer and the

## Plaintiff's Exhibit 60-C—(Continued)

merchandise, object of the question, is put at the disposal of the judges, who, after a procedure much longer than the one followed in the Bolsa de Comercio, generally decide for the sale of the merchandise.

Answers by Ricardo Horacio Gonzalez to  
Cross-Interrogatories.

To the First Cross-Interrogatory (to Plaintiff's Interrogatory No. 2), he says: [497]

- (a) I am only an exporter of glucose.
- (b) I have always been an exporter and trader in domestic produce.

To the Second Cross-Interrogatory (to Plaintiff's Interrogatory No. 3), he says:

- (a) I have not been employed or acted as agent or broker of any of said firms, but I have had business relations with the plaintiff for about two years, and also with Sociedad Industrial Financiera Argentina, and Eugenio Lang.

(b) I have met Mr. Fred Berger of Cia. Engraw Comercial e Industrial S.A., Mr. Luis Dittsheim of SIFAR, and Juan Lang of Eugenio Lang. The nature and duration of the relationship has been answered under (a).

- (c) Already answered under (b).
- (d) Already answered under (b).

To the Third Cross-Interrogatory (to Plaintiff's Interrogatory No. 4), he says:

- (a) It is a private institution of traders created

Plaintiff's Exhibit 60-C—(Continued)

for the object of dealing with all questions relating to the purchases, sale, exchange and registration of products.

(b) There are only two.

(c) They are privately owned.

(d) Both associations are not competitive. [498]

To the Fourth Cross-Interrogatory (to Plaintiff's Interrogatory No. 5), he says:

(a) To my knowledge glucose is only manufactured from maize in Argentina. According to my estimation, the production attains 35 to 40,000 tons per annum.

To the Fifth Cross-Interrogatory (to Plaintiff's Interrogatory No. 6), he says:

(a) I again state that I only know of production of glucose from maize, the yearly production being, I believe, 35 to 40,000 tons, of which about 8000 have been exported during 1946, the balance being naturally stock on hand or domestic consumption.

To the Sixth Cross-Interrogatory (to Plaintiff's Interrogatory No. 9), he says:

(a) Commodity exchanges in Buenos Aires make no speculation on operations in glucose, which is sold privately. As to quality, there is only one, conforming to the given specifications, and produced from corn.

To the Seventh Cross-Interrogatory (to Plaintiff's Interrogatory No. 18), he says:

(a) In May 1947 we made only one sale of 20 tons for export to Uruguay.

## Plaintiff's Exhibit 60-C—(Continued)

(b) Yes.

(c) It was meant for a candy manufacturer in [499] Montevideo, the merchandise was from our own stock, the amount of said sale was 12,000 pesos Argentine currency, the kind of glucose the one already described, packed in barrels 660 lbs and the price was 0.60 cents Argentine currency per kilo, F.O.B.

(d) Most of this has been answered under (c), as to the number of the export license I do not remember and it is not available to me at the moment.

/s/ CLARA ROBINE

Interpreter

/s/ R. H. GONZALEZ

RICARDO HORACIO

GONZALEZ

Witness

/s/ JONES R. TROWBRIDGE

Consul of the

United States of America